

David Leiter

Sarah Litke

DJLeiter@mlstrategies.com

SLitke@mlstrategies.com

ENERGY AND ENVIRONMENT UPDATE
November 7, 2010

Energy and Climate Debate

Last week's midterm elections signaled a new direction for energy policy, and as current congressmen prepare to return for the lame duck session, winners of the November 2nd elections and the Obama Administration begin planning for the 112th Congress.

Republicans picked up 60 seats in the House, enough to assume control of the lower chamber, even with nine races still undecided. In the Senate, Democrats lost six seats, but still held on to their majority by a margin of 53-46, and the Senate race in Alaska may be undetermined for some time yet to come.

Senator Lisa Murkowski (R-AK), who said late last week that she hopes to work with the Senate and President Obama on reducing carbon emissions without the Environmental Protection Agency (EPA) or a cap and trade system, may soon become only the second person to win a Senate race as a write-in, though it may be weeks before the outcome is known. Senator Strom Thurmond, who served for nearly 42 years, was first elected to the Senate in 1954 as a write-in candidate.

Committee leadership and membership will change to some extent in the Senate, and much more significantly in the House. Senators Jeff Bingaman (D-NM), Barbara Boxer (D-CA), and Daniel Inouye (D-HI) will remain Chairs of the Senate Energy and Natural Resources, Environment and Public Works, and Appropriations Committees, respectively. Though decisions have yet to be finalized, Chairs of the House Energy and Commerce, Ways and Means, Natural Resources, and Appropriations Committees are likely to be Congressmen Fred Upton (R-MI) or Joe Barton (R-TX), Congressman Dave Camp, Congressman Doc Hasting (R-WA), and Congressmen Jerry Lewis (R-CA), Hal Rogers (R-KY), or Mike Simpson (R-ID). Majority Leader Harry Reid (D-NV) is expected to retain his post in the Senate, while Representative John Boehner (R-OH) is anticipated to replace current Speaker of the House Nancy Pelosi (D-CA), who may become House Minority Leader.

Several senior White House staffers recently advised the Obama administration to work with Congress to transfer funding from the 1705 Department of Energy loan guarantee program to the 1603 grants in lieu of tax credits program, to which some in the renewable energy industry responded positively late last week. The concept of the funding transfer was among the options White House energy and climate adviser Carol Browner and National Economic Council director Larry Summers presented to President Obama in an eight-page briefing memo October 25th. Others, including Senator Bingaman, prefer for the dedicated loan guarantee program funding to remain in the program. Reports are that President Obama rejected this option and instead opted for Department of Energy (DOE), Office of Management and Budget (OMB), and Treasury to work more closely in an effort to improve the DOE loan guarantee program.

It remains unclear what, if any, clean energy measures will be considered in the lame duck session, though it is possible that an expansion and extension of the 48C Advanced Energy Manufacturing Tax Credit, an extension of the 1603 grants in lieu of tax credits program, the creation of a renewable electricity standard, and funding for a HomeStar energy efficiency home retrofit program could be attached to a tax package, omnibus appropriations legislation, or a continuing resolution, Majority Leader

Reid's natural gas and electric vehicles bill, or another moving piece during the two week session beginning November 15th.

Regardless of the outcome of the lame duck session, we strongly believe that an energy bill, including a number of tax incentives as well as a possible renewable electricity standard or clean energy standard, will pass in the next Congress. The House and Senate are much more likely to move away from a comprehensive climate bill along the lines of what the House passed last summer or Senators John Kerry (D-MA) and Joe Lieberman (I-CT) proposed earlier this year, and toward a smaller, more balanced energy bill. Other energy issues, including proposals by the Environmental Protection Agency to regulate greenhouse gas emissions, are likely to see added scrutiny and potential delays in a Republican-controlled House and tighter Senate.

During a press conference last Wednesday, President Obama said that he is hoping to work with both sides of the aisle to reach consensus on and pass energy legislation this year, and he cited energy policy as one area of possible bipartisan cooperation. Both Senate Minority Leader Mitch McConnell (R-KY) and Congressman Boehner said that they are open to working with the President on common ground energy issues such as nuclear and clean coal power, natural gas, and plug-in electric vehicles.

Congress

Twenty-Five Cent Federal Gas Tax Increase Proposed

Retiring Senator George Voinovich (R-OH) and Senator Tom Carper (D-DE) urged the National Commission on Fiscal Responsibility and Reform to recommend increasing the federal motor fuel tax by one cent per month for the next 25 months. In a letters sent November 5th, the senators and several major transportation stakeholders asked for 10 cents to be temporarily devoted to deficit reduction that would revert back to transportation when the deficit is under control, and called on the Highway Trust Fund, which reimburses states for transportation infrastructure projects, to retain the remaining 15 cents for highway, bridge, and transit projects.

Upcoming Hearings

Congress will be in recess until November 15th.

Administration

OMB Completes Greenhouse Gas (GHG) Review

The White House Office of Management and Budget completed its review of draft final rules November 2nd and 3rd to set GHG emissions reporting requirements for oil and natural gas wells and related equipment and for facilities that use or produce fluorinated GHGs. Completion of the OMB review is the final step before the EPA releases a final rule.

Department of Defense

Army Adopts Sustainability Policies

The Army issued two policy memorandums October 27th to improve its sustainability. The first, a "Sustainable Design and Development Policy Update," updates the way the Army will approach efficient design of its facilities for more responsible planning and consumption. The second memo, on the "Utilization of Efficient Lighting," aims to replace all incandescent lighting on Army installations within five years.

Department of Energy

Election's Impact on DOE

Energy Secretary Steven Chu is likely to face funding battles, oversight hearings, and pushback over his efforts to advance energy research in the coming Congress. He is also going to need to replace four DOE leaders who have recently announced resignations. Upcoming debate over the Department of Energy's

budget will determine the future of several successful Recovery Act programs such as the Advanced Research Projects Agency-Energy. The lame duck Congress must address the budget issue by December 3rd either through omnibus appropriations legislation or a continuing resolution.

DOE-EPA Reliability Plan Proposed

The Department of Energy's Electricity Advisory Committee urged the creation of a working relationship October 29th between DOE and the Environmental Protection Agency that could assess the impact pending EPA rules, including its proposed N₂O and SO₂ cap and trade proposal and its mercury emissions reduction proposal, could have on electric grid reliability.

Annual Fuel Economy Guide Released

The Department of Energy and the Environmental Protection Agency released the 2011 Fuel Economy Guide November 3rd. The guide provides consumers with information about estimated mileage and fuel costs for model year 2011 vehicles.

Department of Transportation

Aviation Fuel Funding Opportunity Announced

The Department of Transportation issued a funding opportunity October 26th for a drop in alternative aviation fuels. The Federal Aviation Administration is offering a funding opportunity announcement in four research areas. Several \$6 million projects will be awarded to accomplish through specification and fit for purpose testing on a quantity of alternative aviation fuel proposed for delivery. One \$250,000 award will be given to conduct an alternative jet fuel quality and performance control study to be used to enable performance and quality standardization and identify alternative jet fuel property trends. Multiple \$50,000 awards will be granted to conduct a sustainability study for alternative jet aviation fuels. A million dollar award will be provided to develop improved hydroprocessed renewable jet fuel performance and durability research and development and data processing method.

Federal Transit Administration (FTA) Issues Clean Fuel Grants

The Federal Transit Administration announced November 4th that it would allot \$164.7 million made available through two competitive grant programs for environmentally friendly public transportation projects. Sixty-three projects that reduce energy consumption or GHG emissions will receive money through the FTA's Clean Fuels Grant and Transit Investment in Greenhouse Gas and Energy Reduction programs. The Clean Fuels Grant program gave \$89.7 million to 36 transit agencies, the TIGGER program distributed \$75 million to 27 recipients, and the programs were over eight times oversubscribed.

Environmental Protection Agency

EPA Clarifying Biogenic Position

On November 4th, Dina Kruger, Director of the Environmental Protection Agency's Office of Atmospheric Programs Climate Change Division said during a National Corn Growers Association bioenergy forum that the agency is seeking to clarify its position on whether biogenic CO₂ emissions should be counted when determining whether a plant modification triggers GHG emissions control requirements. The agency will require new and modified emission sources to get permits for and control GHG emissions January 2nd.

Ozone Rule to be Completed by Year End

According to a November 1st court filing, the Environmental Protection Agency will issue more protective air quality standards for ozone by the end of the year. The motion asks the U.S. Circuit Court of Appeals for the District of Columbia Circuit to hold lawsuits challenging its ozone standards until the end of the year as the agency readies a final ruling setting more stringent standards for the pollutant. The EPA had initially planned to issue the standards in August and again in October.

Intel Top Green Energy User

Data released by the Environmental Protection Agency last week shows that the information technology company Intel is the biggest user of green energy sources in the U.S. Intel has purchased 1.43 billion kWh of green energy, accounting to 51% of its total energy usage.

EPA Refines Carbon Monoxide Recommendations

The Environmental Protection Agency's Office of Air Quality Planning and Standards published November 2nd its final Policy Assessment for the Review of the Carbon Monoxide National Ambient Air quality Standards. The assessment recommends establishing an hourly standard for carbon monoxide between 9 and 10 ppm to protect against short duration peak exposures to the pollutant and establishing an eight-hour standard for carbon monoxide at 8 to 9 ppm.

Federal Energy Regulatory Commission

LaFleur Issues Priorities

The newest member of the Federal Energy Regulatory Commission, Cheryl LaFleur, said November 2nd that her three priorities on the electricity agenda are electric reliability and security, high-voltage transmission expansion, and connecting renewable energy resources to the grid. Ms. LaFleur was confirmed by the Senate in June.

Federal Trade Commission

Online Retailers Get Civil Penalties

In violation of the Federal Trade Commissions' Appliance Labeling Rule, three online retailers will pay \$400,000 in civil penalties for failing to provide EnergyGuide information on their websites. The civil penalty cases are the first brought by the agency against online retailers for violation of the Rule; the data informs consumers about the energy use of major home appliances and enables side-by-side comparisons of similar models.

General Service Administration

Leadership in Energy and Environmental Design (LEED) Gold for Federal Buildings Approved

The U.S. General Services Administration (GSA) announced October 28th that it would upgrade the requirement for new federal building construction and substantial renovation projects from the Leadership in Energy and Environmental Design Silver Green Building Rating to LEED Gold certification. The higher rating will be reflected in GSA's Facilities Standards for the Public Buildings Service by the end of the year.

Personnel

Lisa Heinzerling, the head of the Office of Policy at the Environmental Protection Agency, announced November 5th that she will leave the Agency in December to return to Georgetown University Law Center, where she is on a two-year leave of absence.

Miscellaneous

Lowes to Pay Nearly \$3 Million

The South Coast Air Quality Management District announced October 29th that home improvement chain Lowes will pay \$2.75 million for allegedly selling paints and coatings that did not meet Southern California's air pollution standards. South Coast Air Quality Management District (SCAQMD) Rule 113 sets strict limits for concentrations of volatile organic compounds in paints and coatings sold in Los Angeles, Riverside, San Bernardino, and Orange counties.

Brazil to Meet Targets Early

At a meeting of Brazil's Forum on Climate Change November 2nd, President Luiz Igancio Lula da Silva announced that the nation is on track to meet its CO2 emission reduction targets four years earlier than planned. President Lula also announced that the nation has developed its Second National

Communication to the United Nations Framework Convention on Climate Change (UNFCCC) and that the administration will establish guidelines and specify strategic actions to reduce GHG emissions of five industry sectors. Finally, he signed a decree establishing rules for the National Fund on Climate Change, the first in the world to use funds from the profits of an oil supply chain to finance climate change adaptation and mitigation efforts.

Virginia Transportation Going Green

In announcing the Going Green with Virginia Transportation program November 4th, Virginia Governor Bob McDonnell directed the Commonwealth's six transportation agencies to pursue sustainable practices in their everyday operations and long-term planning. The Virginia Transportation Secretariat will encourage at least 20% of its eligible workforce to telecommute, and the agencies will reduce waste, increase the use of renewable materials, purchase or lease only Energy Star rated appliances and equipment, decrease energy consumption by at least 5% by FY2012, and procure only diesel fuel that contains at least 2% biodiesel.

Geoengineering Moratorium Encouraged

The 10th Conference of Parties to the Convention on Biological Diversity adopted a plan October 29th to preserve biodiversity in part by encouraging countries to place a moratorium on geoengineering activities that have lasting environmental impacts.

Energy Efficiency Testing Discussions Underway

The United States and the European Union are engaging in high level discussions about harmonizing energy efficiency testing methods and potentially standards. Michael Fitzpatrick of the U.S. Office of Information and Regulatory Affairs made his comments during a panel discussion at the Organization for Economic Cooperation and Development's October 28-29th conference in Paris.

Efficient Buildings Could Reduce Emissions

The International Energy Agency issued a report November 2nd that concluded that improving the energy efficiency of buildings could reduce related CO2 emissions an estimated 12.6 GT by 2050 at relatively low cost. The report, Energy Performance Certification of Buildings, found that buildings, one of the most cost efficient areas for energy consumption reductions, account for 30% of energy use in most countries.

New Mexico Board Approves Climate Rules

New Mexico's Environmental Improvement Board voted November 2nd to approve a GHG emissions cap and trade program that will allow the state to participate in a regional trading program currently under development with other U.S. states and Canadian provinces through the Western Climate Initiative. The program is scheduled to begin in 2012, and will require 63 large industrial sources in New Mexico to reduce its emissions by 2% per year from 2010 levels until 2020.

China's Five-Year Plan to Include Mitigation Measures

China's National Development and Reform Commission announced November 3rd that the nation is drafting regulations for inclusion in its 12th Five-Year Plan (2011-2015) to address the impacts climate change could have on the nation. Requiring resource efficiency, ensuring energy security, and encouraging energy efficiency will also be included in the next road map.

California Voters Reject Prop. 23

California voters overwhelmingly rejected Proposition 23 November. The ballot measure would have suspended the state's landmark Global Warming Solutions Act of 2006 (A.B. 32) until the state's unemployment fell to 5.5% for a year.

Alberta Legislature Introduces Carbon Capture Bill

The Legislative Assembly of Canada's Alberta province introduced a bill November 1st to guide how large-scale carbon capture and storage projects will be conducted. The Carbon Capture and Storage Statutes Amendment Act (Bill 24) would clarify ownership of pore space, or tiny holes in porous rock, where the CO2 would be stored.

\$100 Billion Adaptation Fund Planned

The UN's High Level Advisory Group on Climate Change Financing released a report November 5th that concluded that countries could raise about half of the promised \$100 billion annual climate change fund by putting a price on carbon and implementing a variety of international taxes. Wealthy nations at last year's UN climate change summit in Copenhagen vowed to raise about \$100 billion annually by 2020 to help developing countries cope with the impacts of climate change and develop low carbon energy sources. The advisory group concluded that reaching the goals would be challenging but feasible, and that so doing would require both public and private funds.

World Bank to Focus on Climate Results

The World Bank's Independent Evaluation Group issued a report November 4th that advised the World Bank Group to focus more on ensuring that funded climate-related projects are tracked to determine how effective they are, and then adjust its funding priorities accordingly. The Challenge of Low-Carbon Development: Climate Change and the World Bank Group report is the second in a series analyzing the bank's approach to climate-related development issues.

Non-Government Organizations (NGOs) Release Scope 3 Accounting Draft

The World Resources Institute and the World Business Council for Sustainable Development released two draft protocols November to provide companies more guidance on how to measure and reduce their GHGs. The protocols include a voluntary standard designed to better address indirect emissions throughout the supply chain. The collaboration was launched in 1998 and is known as the Greenhouse Gas Protocol Initiative.

British Columbia Seeks Carbon Trading Input

Canada's British Columbia is accepting comments on a pair of regulatory proposals that would establish standards for verification of GHG emissions offsets and establish emissions trading rules for large emitters. The proposed emissions offsets regulations would meet international offset standards and require that offsets represent real, verifiable, and permanent reductions in total GHG emissions. The proposed emissions trading rules would establish a framework by which large emitters could reduce their emissions with flexibility on the timing and method of the reductions. British Columbia is a part of the Western Climate Initiative.

Building Efficiency Increased by International Code Council (ICC) Codes

The International Code Council approved a model building code during a conference last week that would boost energy efficiency by 30% in commercial and residential buildings beginning in 2012. The new code calls for more efficient lighting, windows, and insulation and 47 states and the District of Columbia have adopted and enforce previous ICC codes.

California Updates GHG Regulations

The South Coast Air Quality Management District updated its regulations November 5th to implement federal GHG rules that require only the largest new and modified sources to control their emissions. The board approved (7-1) amendments to Regulation XVII-Prevention of Significant Deterioration, referencing the federal best available control technology rule and Regulation XXX-Title V Permits, referencing EPA's compliance dates and thresholds for GHGs, applicability requirements, and related definitions.