



ENERGY POLICIES THE 112TH CONGRESS WILL FACE

By Terry W. Roberson, Farnsworth vonBerg, LLP, Houston, Texas (terry@fvllp.com)

The November, 2010 U.S. election will affect United States energy policies in many different ways as the result of a shift to the Republicans of over 60 seats in the House of Representatives. With the new congressional structure and leadership, the 112th Congress needs bipartisan compromise among its members and with the President in order to pass energy legislation dealing with a variety of issues such as cap and trade, renewable energy standards, EPA regulation of greenhouse gases, renewable energy tax credits, and offshore drilling.

Cap and Trade

Cap and trade legislation will not pass during the 112th Congress. The proposal faced significant political hurdles even when Democrats controlled a majority of both the House and Senate in the previous Congress. The concept had gained traction during 2009 and was at its pinnacle prior to the debate over healthcare reform. The House of Representatives passed the American Clean Energy and Security Act (H.R. 2454) on June 26, 2009 in order to create jobs, increase energy independence, reduce pollution, and keep energy costs low.¹ Despite the success of cap and trade in the House, it has continued to languish in the Senate. The first attempt at a cap and trade bill in the Senate, the Clean Energy Jobs and American Power Act of 2009 (S. 1733), was passed by the Senate Environment and Public Works Committee in November 2009 and placed on Senate Legislative Calendar in February, 2010. After a series of shifts in senatorial sponsors and support for various versions of this legislation, however, Harry Reid (D-NV) said he did not have the votes in the Senate to pass a climate bill in July, 2010 and would not bring this bill to vote during the 111th Congress. Given significant Republican opposition to the concept, it will not have any better chance in the next Congress. In fact, on December 9, 2010, Ted Poe (R-TX) introduced the Ensuring Affordable Energy Act (H.R. 6511), which has 25 original cosponsors.²

Renewable Energy Standards

Renewable energy standards for electricity are gaining traction. Jeff Bingaman (D-NM) introduced the Renewable Electricity Promotion Act (S. 3813), which has 34 bipartisan

¹ See Speaker Nancy Pelosi, American Clean Energy and Security Act, *available at* <http://www.speaker.gov/newsroom/legislation?id=0322> (last visited Nov. 30, 2010).

² See The Library of Congress, H.R. 5611, *available at* <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.6511>: (last visited Jan. 10, 2011).

cosponsors.³ The proposed act would require utilities to have 15 percent of their electricity generated from renewable resources by 2021. Renewable resources include: solar, wind, geothermal energy, ocean energy, biomass, landfill gas, qualified hydropower, marine and hydrokinetic, and waste-to-energy. Utilities would achieve compliance by submitting renewable energy credits to the Secretary of Energy, submitting energy efficiency credits for up to 26.67 percent of the requirements in any calendar year, making an alternative compliance payment of 2.1 cents per kilowatt, or some combination of those three to ensure compliance. Renewable energy credits would then be tradable for three years. Utilities that fail to comply would be issued a civil penalty that is equal to the production obtained by multiplying the number of kilowatt-hours sold to consumers by 200 percent of the value of the alternative compliance payment.

The key to the Act's success is that roughly 34 states already have renewable portfolio standards requirements or goals. Although many industry experts would rather have one consistent standard across the country instead of a patchwork of different requirements among the several states, bipartisan support is necessary in order to address the American public's concerns about the potential cost of the legislation and the impact of additional federal government regulation in this area. The 112th Congress must address overall costs and subsidies, which should be done with not only bipartisan compromise but also insight from the electricity industry.

EPA Regulation of Greenhouse Gases

Expect bipartisan scrutiny of the EPA's greenhouse gas ("GHG") regulations. In April, 2007, the U.S. Supreme Court held in *Massachusetts v. EPA* that the Clean Air Act ("CAA") authorizes the EPA to regulate greenhouse gases.⁴ Once President Barack Obama took office in January, 2009, the EPA began issuing GHG regulations. As a prerequisite to finalizing EPA's Corporate Average Fuel Economy (CAFÉ) standards for light duty vehicles, EPA found in December, 2009 that six GHGs endangered the public health and welfare and the emissions of these gases from new motor vehicles contribute to GHG pollution.⁵ The EPA's endangerment findings currently face fierce opposition in the Legislative and Judicial Branch. Lisa Murkowski (R-AK) introduced a resolution that nullifies the endangerment finding rule that was defeated in the Senate 47-53 in June, 2010. In addition, Jay Rockefeller (D-WV) introduced the Stationary Source Regulations Delay Act in March, 2010 that would suspend regulations for two years and is currently demanding a vote on this bill.⁶

The CAA requires the EPA to regulate air pollutants from stationary sources, e.g., factories, which emit more than 250 tons a year. GHGs are emitted in much higher volumes than other air pollutants, however, so the threshold must be reduced. Otherwise, the level of permits in a state could increase from 20 to 2,000 because of GHGs. Accordingly, the EPA issued the tailoring rule that requires GHGs to be regulated under the CAA's Prevention of Significant Deterioration

³ See The Library of Congress, S.3813, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S.3813>: (last visited Nov. 30, 2010).

⁴ See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁵ See Endangerment and Cause or Contribution Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66496 (2009) (to be codified at 40 C.F.R. § I).

⁶ See The Library of Congress, S.3072, available at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.3072>: (last visited Nov. 30, 2010).

and Title V Operating Permit programs. These programs are developed and regulated by states. The EPA claims, however, that 13 states are not capable of enforcing these new rules and the federal government might be required to take over those or all states GHG regulation. Numerous states have filed suit with the U.S. Court of Appeals for the D.C. Circuit challenging the EPA's endangerment findings. And, as stated above, the Ensuring Affordable Energy Act expressly denies the appropriation of funds to the EPA to implement or enforce any statutory or regulatory requirements pertaining to the emission of GHGs from stationary sources.

The EPA has now begun requiring permits for the exploration and production of natural gas. In December, 2010, the EPA issued a rule requiring that facilities that inject carbon dioxide underground must report GHG data to the EPA annually.⁷ This measure directly affects all operators that use hydraulic fracturing to capture natural gas and service companies that provide goods or services for "fracking". In particular, numerous separate companies would be required to disclose confidential data regarding all fluids used in the process of fracking a particular well. The Federal Trade Commission submitted a comment to the EPA warning that this rule would make public competitively sensitive business information.⁸ Congress must determine whether a federal regulatory agency may require corporations to produce confidential data (e.g., the Coca-Cola formula), which will be made public in an effort to protect the public.

The Kyoto Protocol of 1997 is an international agreement that sets binding targets on 37 industrialized countries and the European community to reduce GHG emissions. The U.S. is the only industrialized country to not ratify the Kyoto Protocol, which expires at the end of 2012. Therefore, Congress will face at least a final push to ratify this agreement along with legislation to reduce the EPA's regulation of GHGs.

Renewable Energy Tax Credits

The 112th Congress must address several renewable energy tax credits that or will expire at the end of 2011. The existing credits structure was extended for one more year when President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (H.R. 4853) on December 17, 2010.⁹ After much debate, the House adopted the Senate's amendments to the well-publicized "tax bill" in a bipartisan vote that included three Republicans. In addition to extending the Bush-era tax cuts, the bill also extended several renewable energy tax credits until December 31, 2011, including those for biodiesel fuel, new energy efficient home credits, solar and geothermal energy projects, ethanol fuel, and energy efficient appliance credits. Additionally, Section 401 of the bill enacts a special depreciation rule for certain energy business assets that are acquired and placed in service after September 8, 2010 and before January 1, 2012, allowing such items to be one hundred percent expensed during the year in which they are placed in service.

⁷ See Mandatory Reporting of Greenhouse Gases: Injection and Geologic Sequestration of Carbon Dioxide; Final Rule, 75 Fed. Reg. 75060 (2010) (to be codified at 40 C.F.R. §§ 72, 78, and 98).

⁸ See Federal Trade Commission, FTC Submits Comment to EPA on Proposed Rule Concerning Confidentiality of Greenhouse Gas Data, Oct. 8, 2010, *available at* <http://www.ftc.gov/opa/2010/10/greenhouseelpaso.shtml> (last visited Nov. 30, 2010).

⁹ See The Library of Congress, H.R. 4853, *available at* <http://thomas.loc.gov/cgi-bin/query/D?c111:7:/temp/~c111N8UxDq::> (last visited Jan. 5, 2011).

The debate over future extension of renewable energy tax credits will be contentious, particularly in advance of the 2012 presidential elections. Republicans and “Blue Dog” Democrats likely will view such tax credits to be a continuation of excessive spending. Success may depend on whether Congressmen and Senators representing agricultural districts can gain enough clout and receive sufficient pressure from the corn ethanol and biodiesel lobbies. Focus also will soon turn to Iowa, which is the biggest corn-producing state, as the 2012 Democratic and Republican 2012 presidential primaries approach.

Offshore Drilling

Offshore drilling legislation is inevitable during the 112th Congress, because Congress will seek to pass legislation to counteract the Executive Branch’s moratoriums. The Deepwater Horizon explosion and spill in the Gulf of Mexico will drive this issue. The Minerals Management Service (“MMS”) division of the U.S. Department of Interior was responsible for regulatory oversight and revenue management of offshore drilling. In May, 2010, the Department’s Acting Inspector General wrote a letter to Interior Secretary Ken Salazar along with its investigative report that found illegal and unflattering actions taken by MMS employees.¹⁰ In an effort to fundamentally restructure the former MMS, it was renamed to the Bureau of Ocean Energy Management, Regulation and Enforcement (“BOEMRE”) in June, 2010. Secretary Ken Salazar issued Order No. 3299, which established three new management structures in an effort to separate and reassign the responsibilities of MMS.¹¹ The Bureau of Ocean Energy Management will balance environmental considerations, the Bureau of Safety and Environmental Enforcement will promote and enforce safety, and the Office of Natural Resources Revenue is in charge of the royalty and revenue management.

Congress also must address the Consolidated Land, Energy, and Aquatic Resources Act of 2010 (“CLEAR”) (H.R. 3534).¹² On July 30, 2010, the House of Representatives passed the CLEAR Act, which creates new safety standards, modifies liability limits, and further reforms the MMS. The 112th Congress will address this bill in the Senate; however, Republicans oppose the current form of this legislation based on arguments that it would threaten jobs and potentially increase energy costs and dependence on foreign oil. Some of the more controversial provisions include a tax on American oil and gas, mandatory spending on programs that do not relate to the oil spill, moratoriums, and unlimited liability caps for offshore energy producers.

Moratoriums on offshore drilling continue to make the headlines. On May 30, 2010, the MMS issued a six month moratorium on deepwater drilling activities at depths greater than 500 feet.¹³ Subsequently, Hornbeck Offshore Services, L.L.C. filed a request for injunction on June 7, 2010 with the federal district court in Louisiana. On June 22, 2010, Judge Feldman granted a preliminary injunction based on the argument that the government acted arbitrarily and

¹⁰ See Office of Inspector General, U.S. Department of the Interior, Island Operating Company, et. al., *available at* <http://www.doi.gov/images/stories/reports/pdf/IslandOperatingCo.pdf> (last visited Nov. 30, 2010).

¹¹ See http://elips.doi.gov/app_so/act_getfiles.cfm?order_number=3299 (last visited Nov. 30, 2010).

¹² See The Library of Congress, H.R.3534, *available at* <http://thomas.loc.gov/cgi-bin/query/D?c111:3:./temp/~c11182EQ6K::> (last visited Nov. 30, 2010).

¹³ See <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=33716> (last visited Nov. 30, 2010).

capriciously in issuing the moratorium.¹⁴ On July 8, 2010, the Fifth Circuit denied the government agencies' request for a stay. Secretary Ken Salazar issued a second moratorium on July 8, 2010, based on new evidence regarding safety concerns, issues with blowout preventers, and oil spill response capabilities. Once again, the government sought to dismiss the Hornbeck case. However, on August 16, 2010, the Fifth Circuit denied the motion to vacate the preliminary injunction and remanded the case back to the district court for determination under the second moratorium. Additional suits have been filed on both moratoriums, but they expired on November 30, 2010. Therefore, the issue of moratoriums was brought up again on December 1, 2010 when Secretary Ken Salazar stated the Eastern Gulf of Mexico would remain under a congressional moratorium and BOEMRE will not pursue development in water off the East Coast through 2017.¹⁵

The 112th Congress faces several issues affecting United States energy policies: cap and trade, Renewable Electricity Standards, EPA regulation of greenhouse gases, renewable energy tax credits, and offshore drilling. Their success depends on bipartisan compromise between the Executive and Legislative branch, along with the industry itself. Both political parties recognize the implications of the 2010 election and the importance of the 2012 presidential election. Economic issues will drive this session and most decisions will be tied to the unemployment rate or reducing the deficit.

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¹⁴ See *Hornbeck Offshore Services, L.L.C. v. Salazar*, 696 F. Supp.2d 627 (E.D. La. 2010).

¹⁵ See, U.S. Department of the Interior, Salazar Announces Revised OCS Leasing Program, Dec. 1, 2010, available at <http://www.doi.gov/news/pressreleases/Salazar-Announces-Revised-OCS-Leasing-Program.cfm> (last visited Nov. 30, 2010).