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# Featured Article

## ***U.S. Energy and Climate Change Policy: What to Expect in 2009***

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The November elections dramatically reshaped Washington's political landscape, especially in the area of energy and climate change policy. President-elect Barack Obama made clean energy and climate change solutions a central theme of his campaign, and the leaders of more robust Democratic majorities in the Senate and the House of Representatives are pursuing similar agendas. Thus, one might guess that Federal legislation on greenhouse gas regulation and renewable energy requirements, for instance, is just around the corner. While the clean energy agenda certainly received a boost in the elections, however, political challenges remain, and other serious problems facing the Nation will compete for attention in the early days and months of the new Administration and Congress.

### **Unfinished Business from 2008**

When the 111th Congress and the Obama Administration take the reins of the U.S. government in January, they will inherit a number of important unresolved energy and climate policy issues.

#### *Climate Change*

Despite a major legislative push in 2008, the Federal government has yet to develop a coherent policy to address greenhouse gas emissions. The Senate Environment and Public Works Committee reported a comprehensive climate change bill sponsored by Senators Lieberman (I-CT) and Warner (R-VA), and the full Senate debated this cap-and-trade bill (S. 3036) for several days in June 2008. The measure garnered 48 votes for cloture, 12 shy of the 60 needed to break a Republican-led filibuster. Thus, while this bill made more progress through the legislative process than climate bills in prior Congresses (and forced Senators and constituency groups to focus on important details of the program for the first time), the experience also made clear that future such legislation will require a broader coalition of supportive legislators.

In the House, climate legislation did not get to the committee mark-up stage. In the closing days of the 110th Congress, Energy and Commerce Committee Chairman John Dingell (D-MI) and Energy and Air Quality Subcommittee Chairman Rick Boucher (D-VA) released a draft climate change bill<sup>1</sup> intended to serve as a focal point for debate in the upcoming Congress. Like the Lieberman-Warner bill, the Dingell-

Boucher draft proposes an economy-wide cap-and-trade program in thoughtful detail. However, this proposal has not been considered by the Energy and Commerce Committee, and, as discussed below, the leadership of that committee will change in the coming Congress.

In addition to comprehensive climate change legislation, there are other open items on the climate change agenda. For example, the Bush Administration initially denied a Clean Air Act preemption waiver requested by the State of California that would have allowed California to implement greenhouse gas emission standards for new automobiles; however, the Obama Administration is expected to reconsider and reverse that decision and let California (and 17 other states) proceed with state regulation. The U.S. Environmental Protection Agency (EPA), under new leadership, will also need to decide what to do next with the rulemaking initiated in response to the Supreme Court's *Massachusetts v. EPA* decision<sup>2</sup> concerning regulation of greenhouse gas emissions under the Clean Air Act. The Bush Administration released an advanced notice of proposed rulemaking—essentially a scoping document—last summer, and received comments in December 2008.

#### *Energy Policy*

While Congress enacted significant energy legislation in both 2005 and 2007, some issues could not be addressed in those bills. For instance, Congress considered, but did not pass, proposals for a Federal renewable electricity standard that would require utilities to meet a minimum proportion of their sales with renewable generation sources. Other measures, such as tax incentives for renewable energy resources, have been extended only for short periods and will need to be reconsidered by the incoming Congress. Finally, there are new, emerging issues that have not yet received serious consideration by Congress, such as updating the rules for electricity transmission to support the deployment of renewable energy resources in remote areas, and changes in law that may be needed to support development of carbon capture and sequestration infrastructure.

#### *Competing Priorities*

Of course, the incoming Congress and Administration are also inheriting other momentous policy problems, including the wars in Iraq and Afghanistan, the credit crisis and reeling economy, and a domestic auto industry on the brink of bankruptcy. Thus, energy and climate initiatives will have stiff competition for attention in the early months of 2009.

### **Key Players**

As a result of the November elections, Washington will have a new cast of leaders on energy and climate change issues in the Obama Administration, and newly fortified majorities for the Democrats in both houses of Congress.

### *Administration*

During the campaign, President-elect Obama supported an ambitious suite of energy and climate policies, including an economy-wide cap-and-trade program to reduce greenhouse gas emissions 80 percent below 1990 levels by 2050, a \$150 billion Federal investment over 10 years to create 5 million new “green collar” jobs in clean energy industries, a goal of putting 1 million plug-in hybrid cars on the road by 2015, and a mandate that 10 percent of our electricity come from renewable sources by 2012 and that 25 percent come from renewable sources by 2025.<sup>3</sup> To implement this policy vision, the President-elect has announced his nominees for key posts:

- *Secretary of Energy.* Dr. Steven Chu, a Nobel Laureate physicist and Director of the Lawrence Berkeley National Laboratory, has been nominated to serve as Energy Secretary. Chu has supported research on biofuels and solar energy and is a strong proponent of action to mitigate climate change.<sup>4</sup>
- *EPA Administrator.* President-elect Obama has named Lisa P. Jackson, currently Chief of Staff to New Jersey Governor Jon Corzine and formerly New Jersey’s Commissioner of Environmental Protection, to serve as the head of the Environmental Protection Agency.<sup>5</sup> Jackson advocated aggressive greenhouse gas emissions reductions in New Jersey.
- *White House Coordinator of Energy and Climate Policy.* Carol Browner, a former EPA Administrator, has been named to serve in this new White House position.<sup>6</sup> While her duties are still undefined, Browner will no doubt play a leading role on cross-cutting issues such as climate change.
- *Chair of the Council on Environmental Quality.* Nancy Sutley, currently a Deputy Mayor of the City of Los Angeles, has been named to chair the Council on Environmental Quality. Sutley was a top assistant to Carol Browner at the EPA during the Clinton Administration.

### *Congressional Leaders*

As a result of the November elections, Democrats have increased majorities of 58-41<sup>7</sup> in the Senate, and 257-178 in the House.

In the Senate, the key leadership positions are unchanged. Majority Leader Harry Reid (D-NV), Environment and Public Works Committee Chairman Barbara Boxer (D-CA), and Energy and Natural Resources Committee Chairman Jeff Bingaman (D-NM) will all remain in their positions. Climate initiatives are expected to be considered in the Environment and Public Works Committee; energy policy initiatives will originate in the Energy and Natural Resources Committee.

In the House, Speaker Nancy Pelosi (D-CA) will retain her role, but there has been a key change in leadership in the House Energy and Commerce Committee, which has jurisdiction over energy and climate change issues. Rep. Henry Waxman (D-CA), a committed environmentalist, was selected by the Democratic caucus to serve as chairman of the Committee, ousting Rep. John Dingell (D-MI) from the position. This change of leadership portends more aggressive action from the House on climate change issues. Note that Speaker Pelosi, Chairman Boxer and Chairman Waxman are all from California, a State that has been a leader on climate change regulation.

While environmentalists will find strong support for their climate agenda in many key positions, Senate Energy and Natural Resources Committee Chairman Bingaman is viewed as a moderate on energy issues. Coal interests can be expected to look to Senate Finance Committee Chairman Baucus (D-MT), Senate Commerce Committee Chairman Rockefeller (D-WV), and House Natural Resources Committee Chairman Rahal (D-WV) for support, and clean coal initiatives are likely to receive special attention in any climate change legislation.

### **Key Legislative Vehicles in the 111th Congress**

Energy and climate issues will likely arise in several anticipated legislative proposals, including an economic stimulus package, a comprehensive energy bill, climate legislation, highway reauthorization, and appropriations.

#### *Economic Stimulus*

Congress is expected to present President Obama with an economic stimulus package to sign very soon after his inauguration. Speaker Pelosi has estimated that the package will total about \$600 billion, with roughly \$200 billion in tax cuts and \$400 billion in spending, including infrastructure projects and aid to states.<sup>8</sup> Others have subsequently suggested that an \$850 billion package would be appropriate. The overriding purpose of the stimulus is to get the Federal funds spent quickly to create jobs and revive the economy. President-elect Obama’s recovery plan included a “green jobs” component, including building wind farms, solar panels and fuel efficient cars, modernizing the electricity grid, and making public buildings more energy efficient.<sup>9</sup> It is expected that “green job” and clean energy themes will be reflected in the stimulus package, to the extent such programs can be mobilized for near-term stimulus.

In the “bailout bill,” enacted in early October 2008,<sup>10</sup> Congress provided a number of energy-related tax law changes, including:

- a one-year extension (through 2009) of the production tax credit (PTC) for wind-generated electricity;

- a two-year PTC extension (through 2010) for electricity produced from other specified renewable energy resources;
- accelerated depreciation for utilities installing smart meters and smart grid technologies;
- an extension through 2009 of the tax credit for builders of new energy efficient homes;
- a new tax credit of up to \$7,500 for plug-in hybrid vehicles;
- extension through 2009 of the tax credits for production of biodiesel and other biomass-based diesel fuels
- extension and expansion of the investment tax credit for new coal generation facilities that capture and sequester 65% of their CO<sub>2</sub>; and
- a new carbon sequestration credit for each ton of CO<sub>2</sub> sequestered in a geologic formation (\$20/ton) or in enhanced oil recovery (\$10/ton).

The January stimulus package, which is almost certain to be enacted in the early days of the Obama Administration, could include a similar list of clean energy tax incentives if Congress is persuaded that such measures will lead to near-term job creation. Depending on the state of the economy, further stimulus packages could follow later in the session.

#### *Energy Legislation*

It is expected that the Senate Energy and Natural Resources Committee will begin work on energy legislation early in the new Congress, with the goal of moving to mark-up in early spring. This legislation could address a broad range of issues, including:

- Renewable electricity standard;
- Transmission development and smart grid;
- Energy efficiency, including green building measures;
- Energy production on public lands;
- Carbon capture and sequestration, including deployment incentives and regulatory/liability frameworks; and
- Energy project financing, including restructuring of the Department of Energy (DOE) loan guarantee program.

It is less certain, however, where energy legislation figures in the House agenda. Incoming Energy and Commerce Committee Chairman Waxman has a history of leadership on health and environmental policy matters, but has not announced his intentions for energy policy.

The Obama campaign set forth a number of detailed energy proposals. As Among them were (1) an aggressive renewable

electricity standard, (2) substantial public investment in clean energy, (3) tougher fuel economy standards for automobiles, (4) a national low carbon fuel standard, (5) support for commercialization of carbon capture and sequestration technologies and (6) support for the development of the Alaska natural gas pipeline. Given other priorities, however, the Obama Administration may leave it to Congressional leaders to take the first steps in outlining the details of an energy bill.

#### *Climate Change Legislation*

With fortified Democratic majorities in both houses of Congress, the conditions for legislative action on climate change are much improved. In addition, Congress will enjoy support from the White House. President-elect Obama has stated that climate change “is a matter of urgency and national security and it has to be dealt with in a serious way,” adding “the time for delay is over.”<sup>11</sup> His appointees appear poised to take an active role in the Congressional deliberations on climate change, which should begin early in the next session. However, proceeding to enactment will take time given the fragile state of the economy, the complexity of the problem, and the need to balance the concerns of various regions and interest groups.

The work done in the 110th Congress will provide a strong foundation for the deliberations. The detailed proposals contained in the comprehensive climate bill offered by Senators Bingaman and Specter, the Lieberman-Warner bill that went through committee mark-up, and the Dingell-Boucher discussion draft provide valuable starting points for the new Congress.

While the new Administration and the new Congress seem substantially more inclined to act on climate change legislation, it may take some time for their efforts to get underway. For the Administration, the cabinet-level appointees must work their way through the confirmation process, get subordinates named and confirmed, hire staff and work out the allocation of responsibilities within the Administration. Although both the EPA and the DOE have claims to leadership on climate change issues, and many other Federal agencies have important stakes in the debate, the appointment of Carol Browner to serve in the new position of White House Coordinator of Energy and Climate Policy signals that the White House will take the lead on this issue. In terms of policy, the Obama campaign set a goal of reducing greenhouse gas emissions by 80 percent below 1990 levels by 2050 through a cap-and-trade program, with 100 percent auctioning of allowances.<sup>12</sup> The White House may choose to provide leadership on this issue by offering its own detailed legislative proposal on climate change for the Congress to consider, but the development of such detailed proposals could take months.

In the House, Rep. Waxman will assume the chairmanship of the Energy and Commerce Committee, which has broad jurisdiction and a packed legislative agenda. Chairman Waxman will probably also need time to assemble his staff. A recently announced decision by Chairman Waxman to “partner” with ousted Chairman Dingell may signal a more collaborative approach than might have been expected.

While there have been no changes in the key leadership positions in the Senate, it is still not clear what direction the climate debate will take in that chamber. Chairman Boxer has recently suggested passing streamlined climate change legislation along the lines of California's 2006 Global Warming Solutions Act (A.B. 32).<sup>13</sup> Under this legislative approach, Congress would provide high-level climate change policy goals that would be implemented by EPA through a process of administrative rulemakings. This approach would certainly simplify the legislative drafting—A.B. 32 is 16 pages long; the Lieberman-Warner bill was 492 pages. However, given the economy-wide impacts of climate legislation and the keen interest from business, agricultural, labor and environmental groups in the details of the program, it seems unlikely that Congress would be willing to delegate the critical decision-making to EPA or another administrative agency.

Notably, the key Congressional proposals on climate change—including the Lieberman-Warner bill and the Dingell-Boucher discussion draft—share the basic framework of a cap-and-trade program. The use of a tax to create a “price on carbon,” while favored by many economists and a handful of legislators, is generally seen as too politically unpopular to be a viable alternative in Congress. Another possibility, given the D.C. Circuit Court of Appeals' decision remanding<sup>14</sup> the Bush Administration's Clean Air Interstate Rule (CAIR), is that Congress may again consider a “four pollutant bill” covering utility sector emissions of carbon dioxide (as well as SO<sub>2</sub>, NO<sub>x</sub> and mercury). Senator Carper (D-DE) has sponsored such bills in the past, and has discussed reintroducing his bill in light of the remand of the CAIR rule.<sup>15</sup> However, Congress seems certain to focus in the first instance on proposals for an economy-wide cap-and-trade program.

The House will truly “show its cards” on climate change legislation for the first time in 2009. It appears, however, that the Senate will be the pivotal institution in determining whether Federal climate change legislation can be enacted. Democrats are still shy of a filibuster-proof 60 votes in the Senate, and so they will need to work with moderate Republicans. Moreover, after the Lieberman-Warner debate a group of moderate Democrats<sup>16</sup> who voted for cloture expressed significant concerns about aspects of

the Lieberman-Warner approach, as well as their intent to be a moderating influence in the climate change debate going forward. These Senators support greenhouse gas regulation, but have expressed concern about cost containment, impacts on the competitiveness of U.S. industry, assistance to low-income families and energy-intensive businesses, promotion of carbon capture and sequestration technology, and the provision of offset credits to encourage agricultural and other interests to take constructive action.

In sum, many of the critical leadership positions in Congress and in the Administration are now held by supporters of prompt and meaningful legislation to reduce greenhouse gas emissions. This is obviously a significant change. Nevertheless, passing federal climate change legislation will still be very difficult, and while action will get started early in 2009, this is likely to be a multi-year project.

#### *Other legislation*

In addition to the anticipated stimulus package, energy bill, and climate change legislation, climate and clean energy issues are likely to come up in many other legislative venues. These themes are likely to be apparent in the Fiscal Year 2010 appropriations process, as the Administration seeks to push toward green results in Federal budgeting decisions. Congress will also consider highway program reauthorization, which is likely to include a range of transportation-related green energy initiatives. More broadly, Congress and the Administration are likely to view the activities of nearly every Federal agency through the lens of clean energy and climate change.

#### **Administrative Action**

While Congress is considering legislation, the new Administration will also have a number of opportunities to take administrative actions to advance its climate and clean energy agenda. In *Massachusetts v. EPA*,<sup>17</sup> the U.S. Supreme Court determined that CO<sub>2</sub> is an air pollutant as defined in the Clean Air Act, and therefore is subject to EPA's mandate to regulate any air pollutant that may endanger public health or welfare. In response to the court decision, EPA issued in July 2008 an Advance Notice of Proposed Rulemaking, requesting comment on various options for regulating greenhouse gas emissions under the Clean Air Act, but declining to determine that CO<sub>2</sub> endangers public health or welfare under the Clean Air Act. President-elect Obama has stated that he would make that endangerment finding,<sup>18</sup> and his campaign energy advisor suggested the new President would proceed to regulate greenhouse gases under the Clean Air Act if Congress does not move quickly enough.<sup>19</sup> While most legal experts agree that the existing Clean Air Act would be a cumbersome vehicle for sensible climate

change policy, the prospect of administrative action to adopt climate change regulations may be a prod to Congressional action.

The new Administration will also likely clear the way for stronger state-level regulation of greenhouse gas emissions from automobiles. In February 2007, EPA denied California's request for a Clean Air Act waiver of pre-emption for its greenhouse gas emission standards for new motor vehicles, finding that because greenhouse gases have global impacts, the California standards are not needed to "meet compelling and extraordinary conditions" in California as the law requires.<sup>20</sup> President-elect Obama has promised to revisit this decision, and seems likely to reverse it.

President Obama may also issue new executive orders in the early days of his administration to lend weight to his climate change and clean energy agendas.

On the diplomatic front, President-elect Obama has indicated that his administration will constructively engage in the international negotiations on a climate change treaty to succeed the Kyoto Protocol. The United Nations Framework Convention on Climate Change Conference of the Parties has agreed to a December 2009 deadline for such an agreement, so the first year of the Administration should see intense diplomatic engagement in this regard.

### **Clean Energy and Climate Change Policy in 2009**

Any prognostications in the area of energy and climate policy come with two important caveats. First, unforeseen changes in circumstances can shift the focus of the energy/climate policy debate (during the campaign, for instance, \$4 per gallon gasoline prices dominated the discussion). Second, other more pressing national and world events can divert political leaders' attention from these matters. However, the incoming Obama Administration and the leadership in Congress appear to be committed to making transformative changes in our energy sector, and appear to understand that sustained attention to getting the policy framework right will be required.

As a result of the elections, we can expect a sea change on clean energy and climate change policy issues. These issues will be addressed on multiple fronts in 2009. In January, the Administration and the Congressional leadership will pursue clean energy and green job themes in a near-term stimulus package. Beginning in the first quarter, after completing the confirmation process for early Administration appointees, the Senate Energy Committee will seek to drive consideration of energy legislation designed to speed the transformation to a clean energy economy. Over a longer timeframe, Congress and the Administration will actively undertake the large and difficult task of developing

comprehensive climate change legislation and building the necessary political coalition for enactment. In parallel, the Administration will be pursuing various regulatory, administrative and diplomatic efforts on the clean energy and climate change front, and these themes will be raised in the budget and appropriations process.

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<sup>1</sup> Dingell-Boucher Discussion Draft, [http://energycommerce.house.gov/images/stories/Documents/PDF/selected\\_legislation/clim08\\_001\\_xml.pdf](http://energycommerce.house.gov/images/stories/Documents/PDF/selected_legislation/clim08_001_xml.pdf).

<sup>2</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>3</sup> Obama for America, Barack Obama and Joe Biden: New Energy for America, [http://www.barackobama.com/pdf/factsheet\\_energy\\_speech\\_080308.pdf](http://www.barackobama.com/pdf/factsheet_energy_speech_080308.pdf) (last visited Dec. 23, 2008).

<sup>4</sup> John M. Broder, *Obama Team Set on Environment*, N.Y. Times, Dec. 10, 2008, available at <http://www.nytimes.com/2008/12/11/us/politics/11appoint.html?scp=1&sq=jackson%20browner%20New%20Jersey%20sutley&st=cse>.

<sup>5</sup> David A. Fahrenthold, *Seasoned Regulators to Lead Obama Environment Program*, Wash. Post, Dec. 12, 2008, at A09, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/11/AR2008121103669.html>.

<sup>6</sup> John M. Broder & Andrew C. Revkin, *Hard Task for New Team on Energy and Climate*, N.Y. Times, Dec. 15, 2008, available at <http://www.nytimes.com/2008/12/16/us/politics/16energy.html?ref=politics>.

<sup>7</sup> The Senate race in Minnesota had not been resolved at the time of this writing. The Democratic figure includes two independents who caucus with the Democrats.

<sup>8</sup> Richard Cowan, *Pelosi Sees About \$600 Bln for Stimulus*, Reuters, Dec. 15, 2008, available at <http://www.reuters.com/article/politicsNews/idUSTRE4BC1PV20081215>.

<sup>9</sup> Deborah Charles, *Obama Focuses on Alternative Energy, Environment*, Reuters, Dec. 15, 2008, available at <http://www.reuters.com/article/politicsNews/idUSTRE4BE6D720081216>; Jackie Calmes & Jeff Zeleny, *Obama Vows Swift Action on Vast Economic Stimulus Plan*, N.Y. Times, Nov. 22, 2008, available at <http://www.nytimes.com/2008/11/23/us/politics/23obama.html>.

<sup>10</sup> Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008). The energy-related provisions are found in Division B of the Act, titled the Energy Improvement and Extension Act of 2008, 122 Stat. 3807.

<sup>11</sup> Steve Holland, *Obama Says Climate Change a Matter of National Security*, Reuters, Dec. 9, 2008, <http://www.reuters.com/article/environmentNews/idUSTRE4B86R920081209>.

<sup>12</sup> Obama for America, Barack Obama and Joe Biden: Promoting a Healthy Environment, <http://www.barackobama.com/pdf/issues/EnvironmentFactSheet.pdf> (last visited Dec. 23, 2008).

<sup>13</sup> Katherine Boyle & Darren Samuelsohn, *Boxer to Introduce Cap-and-Trade, Renewable Energy Bills*, *Env. & Energy Daily*, Nov. 21, 2008.

<sup>14</sup> *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), remanded without vacatur, No. 05-1244 (D.C. Cir. Dec. 23, 2008).

<sup>15</sup> Sen. Tom Carper, Clean Air for America: Implementing Four Pollutant Legislation, Opening Statement at Congressional Roundtable (Sept. 11, 2008), available at <http://carper.senate.gov/press/record.cfm?id=302878>.

<sup>16</sup> The original members of the group included Senators Stabenow (D-MI), Levin (D-MI), Rockefeller (D-WV), Lincoln (D-AR), Pryor (D-AR), Webb (D-VA), Bayh (D-IN), McCaskill (D-MO), Brown (D-OH), and Nelson (D-NE). They have subsequently been joined by Senators Byrd (D-WV), Bingaman (D-NM), Conrad (D-ND), Dorgan (D-ND), Johnson (D-SD) and Salazar (D-CO).

<sup>17</sup> 549 U.S. 497 (2007).

<sup>18</sup> Jim Efstathiou Jr., *Obama to Declare Carbon Dioxide Dangerous Pollutant*, Bloomberg, Oct. 16, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601082&sid=alHWVvGnkcd4&refer=canada>.

<sup>19</sup> *Id.*

<sup>20</sup> See U.S. Environmental Protection Agency, California Greenhouse Gas-Waiver Request, <http://www.epa.gov/OMS/ca-waiver.htm> (last visited Dec. 23, 2008).