

Energy & Environment Law Update – January 8, 2013

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Energy and Climate Debate

After lengthy negotiations during the lame duck session, the 112th Congress approved January 1 legislation (H.R. 8) to avoid the fiscal cliff just prior to adjourning; the president quickly signed the bill into law. The new Congress was sworn in January 3, and the House and Senate will return to Washington later this month.

The American Taxpayer Relief Act, which prevents hundreds of billions of dollars in automatic tax increases and budget cuts from kicking in, includes, among other things, more than \$18.1 billion to extend existing energy tax incentives over a ten-year period. The largest item, at \$12.2 billion, is a one-year extension of the production tax credit and a tweak to the credit that allows projects put under construction, rather than placed in service, by the end of 2013 to qualify. The modification, which was included in tax extenders legislation (S. 3521) the Senate Finance Committee approved in August, establishes a de facto extension lasting at least two and a half years, but it could present an opportunity for the credit to be sunsetted as the new Congress considers future tax reform. The tax credit is valued at 2.2 cents/KWh for wind, and between 1.1 cents and 2.2 cents/KWh for hydropower, marine and hydrokinetic power, biomass, geothermal, solar, and municipal solid waste. The measure also reinstates a Recovery Act provision that allows qualified sources to take the production tax credit as a 30 percent investment tax credit instead.

The package includes language to extend for one year the \$1.01/gallon cellulosic biofuels credit, which was also expanded to include algal fuel, and a one-year extension of the \$1/gallon tax credit for biodiesel. The measure extends the Accelerated Depreciation Allowance for Cellulosic Biofuel Plant Property, which allows a 50 percent depreciation allowance for biofuel plants placed in service by the end of the year. It extends for one year an alternative fuel infrastructure tax credit that the industry believes will accelerate E85 into the marketplace. The deal includes a one year extension of energy efficiency tax incentives retroactively through 2012, including up to \$500 for homeowners who make specific home improvements as well as \$2,000 per home for builders of new, high efficiency homes and a credit for American manufacturers of highly-efficient refrigerators, clothes washers, and dishwashers.

Congress also passed a one-year extension of the Farm Bill with some exemptions January 1, averting a dairy price hike by including parts of the measure in the fiscal cliff deal. The extension includes no mandatory funding for renewable energy programs, a change from a draft version agreed

to by bipartisan leaders of the House and Senate agriculture committees. The 113th Congress will have nine months to pass a 5-year farm bill.

On January 2, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2013 (H.R. 4310), authorizing appropriations for military programs and construction. The measure also allows the Department of Defense to fund construction of a biofuels production facility if it receives matching funds from the Departments of Agriculture and Energy.

Looking to 2013 and the 113th Congress, potential areas for forward movement in energy policy include energy efficiency, tax reform and related changes to the tax code, a clean energy standard, addressing the rapidly growing natural gas market, revenue sharing, and the development of new energy infrastructure. Within the administration, numerous headlining rulemakings are forthcoming from the Environmental Protection Agency, as well as the Departments of Energy, Agriculture, and State.

Congress

House Approps Subcommittee Chairs

House Appropriations Chairman Hal Rogers (R-KY) announced December 31 that Representative Mike Simpson (R-ID) will remain chairman of the House Appropriations Subcommittee on Interior, Environment, and Related Agencies for the 113th Congress. Representative Rodney Frelinghuysen (R-NJ) will remain chair of the Subcommittee on Energy and Water Development.

Markey for MA Senate Seat

Representative Ed Markey (D-MA) announced December 27 that he will run in the 2013 special election to fill the Massachusetts Senate seat that would be vacated if, as is expected, Senator John Kerry (D-MA) is confirmed by the Senate as the next secretary of State. Congressman Markey has served in the House since 1976 and is a longtime leader on energy and environmental policy.

Hurricane Relief Package

The Senate approved December 28 a \$60.4 billion disaster aid package for Northeastern states harmed by October's Hurricane Sandy. The measure (H.R. 1) was passed 61-33, and the House is expected to pass a comprehensive piece the week of January 14. The Senate will take up the aid bill again as soon as it returns the week of January 21.

Senate Republican Committee Membership

Senate Republicans announced their new committee assignments January 3, pending ratification by the conference and Senate. Senators Deb Fischer (NE) and Roger Wicker (MS) will replace Senators Lamar Alexander (TN) and Mike Johanns (NE) on the Senate Environment and Public Works Committee, where Senator David Vitter (LA) is expected to replace Senator James Inhofe (OK) as ranking member. Senators Alexander, Jeff Flake (AZ), and Tim Scott (SC) will replace Senators Bob Corker (TN), Dan Coats (IN), and Rand Paul (KY) on the Energy and Natural Resources Committee. Senator Lisa Murkowski (AK) will retain her ranking member position. Senators John Boozman (R-AR) and Johanns will join the Appropriations Committee. Senators Johnny Isakson (GA), Rob Portman (OH), and Pat Toomey (PA) will join the Finance Committee. Senator Thad Cochran (R-MS) will be the ranking member of the Agriculture, Nutrition and Forestry Committee.

Coal Export Investigation Sought

Senators Ron Wyden (D-OR) and Lisa Murkowski (R-AK) announced January 4 that they want the Department of Interior to investigate whether coal companies are understating the value of coal mined on federal and tribal lands to avoid paying higher royalties. The incoming leaders of the Senate Energy and Natural Resources Committee expressed concern following a Reuters report last month showing that some coal companies are paying Powder River Basin coal leases based on domestic prices despite selling the coal in China for as much as 10 times that price.

Department of Energy

Pool, Spa Lamps Excluded from EE Standards

The Department of Energy published a proposed rule December 31 excluding incandescent reflector lamps in pools and spas from energy efficiency standards. The agency is seeking to exclude the lamps because they serve a small market and applying efficiency standards would result in insignificant energy savings.

Efficiency Certification Reports Extended

The Department of Energy published a final rule December 31 extending by one year a deadline for manufacturers of commercial ice-making, refrigeration, and water-heating equipment and commercial heating, ventilating, and air conditioning equipment to submit reports clarifying compliance with energy efficiency standards.

\$10 Million for Biofuels

The Department of Energy awarded January 3 more than \$10 million to five projects in California, Washington, Maryland, and Texas to develop new technologies to convert biomass into advanced biofuels and bioproducts like plastics and chemical intermediates.

Department of Interior

NY Offshore Wind Interest Assessment

The Bureau of Ocean Energy Management announced January 3 that it is seeking public comment and expressions of competitive interest to help it assess whether to open a proposed commercial New York offshore wind power project to competition. The public notice covers a 127-square-mile leasing area off Long Island that the New York Power Authority has proposed for developing offshore wind to generate at least 350 MW of electricity.

Department of Transportation

Lithium Battery Shipping Standards

The Pipeline and Hazardous Materials Safety Administration authorized the domestic shipment of lithium batteries by air under a set of international standards released January 1. The agency is considering whether to give shippers the option of continuing to ship the batteries under current hazardous materials regulations, and will accept public comments through March 8.

Environmental Protection Agency

KY Clean Air Act Settlement

The Environmental Protection Agency announced January 2 that Kentucky Utilities Co. had agreed to spend \$57 million to install a sulfuric acid mist emission control system, pay a \$300,000 civil penalty, and complete a mitigation project worth at least \$500,000 to settle Clean Air Act violations at the Ghent Station facility in Kentucky. The proposed consent decree was lodged December 20 in the U.S. District Court for the Eastern District of Kentucky and is subject to public comment through January 28.

WI Clean Air Act Settlement

Wisconsin Public Service Corporation reached a settlement with the Environmental Protection Agency and the Justice Department January 4 requiring the utility to spend \$300 million to upgrade two coal-fired power plants, pay a \$1.2 million civil penalty, and spend \$6 million on additional environmental mitigation projects to settle alleged new source review requirement violations.

HCFC Rule for Interagency Review

The White House Office of Management and Budget received January 1 the Environmental Protection Agency's final rule regarding "Adjustments to the Allowance System for Controlling Hydrochlorofluorocarbons Production, Import, and Export for 2012-2014" for protection of stratospheric ozone.

Particulate Matter Rewrite

The U.S. Court of Appeals for the District of Columbia Circuit ruled January 4 that the Environmental Protection Agency must rewrite a Bush-era rule on implementing particulate matter air quality standards. The court backed environmental groups who argued that the agency took too lax an interpretation.

Cellulosic Ethanol Waiver Sought

The American Fuel and Petrochemical Manufacturers petitioned the Environmental Protection Agency December 31 for a waiver of the 2012 cellulosic biofuel mandate because the fuel is not being commercially produced. Without the waiver, refiners would be required to purchase credits from the agency because no cellulosic ethanol was produced to meet the requirement; the agency has 90 days to respond to the petition.

Emissions Interrelatedness Considerations

The Environmental Protection Agency issued a memo December 21 responding to the U.S. Court of Appeals for the Sixth Circuit's August 7 decision that vacated the agency's determination that Summit Petroleum Corp.'s natural gas plant and production wells in Michigan are adjacent to one another and constitute a single major source. The agency will continue to consider whether emissions sources are functionally interrelated when determining whether they are subject to permitting requirements in all state except for Kentucky, Michigan, Ohio, and Tennessee.

CA Power Plant Permit Opposed

The Sierra Club petitioned the Environmental Protection Agency's Environmental Appeals Board December 19 to overturn the prevention of significant deterioration permit issued for Pio Pico Energy Center LLC in Otay Mesa, California, finding that the agency improperly excluded cleaner generation technologies when issuing an emissions permit to the power plant.

CA Air Plan Opposed

The Sierra Club and Medical Advocates for Healthy Air sued the Environmental Protection Agency in the U.S. Court of Appeals for the Ninth Circuit December 26 asking it to review the agency's prevention of significant deterioration air permitting program adopted by the San Joaquin Valley Air Pollution Control District in California.

7 Agency Priorities for 2013

The Environmental Protection Agency issued an updated regulatory agenda December 21 for 2013, implementing the seven priorities Administrator Lisa Jackson set for the agency in January 2010. The priorities include taking action on climate change; improving air quality; assuring the safety of chemicals; cleaning up communities; protecting American waters; expanding the conversation on environmentalism and working for environmental justice; and building strong state and tribal partnerships.

Jackson to Depart

Environmental Protection Agency Administrator Lisa Jackson announced during the holiday break that she will leave her post sometime after the State of the Union. Deputy Administrator Bob Perciasepe will step in as acting administrator until someone is confirmed by the Senate. He is a potential nominee for the post, as are Washington Governor Christine Gregoire and several others.

CA Clean Cars Program

The Environmental Protection Agency granted California a Clean Air Act waiver December 27 allowing the state to set new standards to control emissions for passenger vehicles through 2025. The Advanced Clean Cars Program includes regulations to phase in stricter fleet average standards for 2015-2025 model year cars and light-duty trucks to further reduce NOx and hydrocarbon emissions, increase engine durability requirements from 120,000 miles to 150,000 miles, and impose new particulate emissions standards on gasoline-powered vehicles. The state also set new emissions limits for 2017-2025 model year cars and light-duty trucks. The standards will reduce vehicular emissions by 75 percent from 2014 levels and put an estimated 1.4 million zero-emission vehicles on the road.

Environmental Stewardship Programs

LG Electronics USA and Environmental Protection Agency announced December 27 that the company will participate in a number of agency environmental stewardship programs with agency support. The pledge is the first from a major consumer electronics company to cover a broad range of agency programs, including initiatives related to product stewardship, environmentally preferred purchasing, green infrastructure, and environmental education.

CA Ozone Plan Deemed Inadequate

The Environmental Protection Agency will issue a final rule January 7 in which it will declare California's plan to comply with the agency's one-hour national ambient air quality standard for ozone in the South Coast region inadequate. The state will have 12 months to present an amended plan that complies with the standard. If the state fails to produce a suitable plan in time, it could face federal sanctions.

Federal Trade Commission

Appliance Labeling Rule

The Federal Trade Commission announced December 31 amendments to its Appliance Labeling Rule to ease burdens on businesses. At the same time, it proposed changes to labeling for refrigerators and washing machines following new Department of Energy tests for measuring energy costs. The Appliance Labeling Rule will be known as the Energy Labeling Rule going forward; it requires energy-efficient labels for major household appliances and other consumer products.

Nuclear Regulatory Commission

NRC Potentially Rushing Spent Fuel Rule

A coalition of 24 environmental groups, including the Alliance for Nuclear Accountability, Beyond Nuclear, and the Blue Ridge Environmental Defense League, filed comments January 2 claiming that the Nuclear Regulatory Commission had acted too hastily in its efforts to develop an environmental impact statement and a revised waste confidence rule regarding the storage of spent nuclear fuel on site after a reactor closes. The Nuclear Energy Institute released comments stating support for the plan to release a decision by September 6, 2014.

International

Canadian Home Heating Oil Exemption

Canadian Environment Minister Peter Kent said December 31 that the government will permanently exempt home heating oil from the two percent renewable fuel content requirement in the federal Renewable Fuels Regulations. The government proposed amendments to the regulations to provide a national exemption for home heating oil and to extend by six months an exemption from the renewable fuel requirement for diesel fuel in Nova Scotia, New Brunswick, and Prince Edward Island.

Carbon Trading Up

Bloomberg New Energy Finance announced January 3 that trading levels in global carbon markets reached a record high in 2012 though the overall value of the market declined due to excessive supply in the European Union Emissions Trading System. Trading activity increased due to the increased use of auctioning to distribute allowances and heightened volatility and speculation association with the European Commission's proposal to support process in the system.

States

NE Keystone Revisions

Nebraska's Department of Environmental Quality sent the Final Evaluation Report on the revised

Keystone XL pipeline route to Governor Dave Heineman (R) January 4. The final report found that the proposed route avoids the Sand Hills and fragile soils in the state, and that any impacts to groundwater due to spill would impact local, but not regional, water sources. The governor must review the report within 30 days, and the decision will be incorporated into the State Department's Supplemental Environmental Impact Statement.

WA Electric Car Fee

In lieu of fuel taxes, electric vehicle owners in Washington will be required to pay a \$100 annual fee at registration renewals due on or after February 1, pursuant to H.B. 2660. The fee is intended to mitigate the impact of electric vehicles on state roads and provide funding to evaluate transitioning from fuel taxes to a road-user assessment system.

LA Alternative Fuel Credit

The Louisiana Department of Revenue issued a final rule December 27 providing an income tax credit for 50 percent of the cost of qualified clean-burning motor vehicle fuel property. The rule defines qualified clean-burning motor vehicle fuel property as equipment necessary for vehicles to operate on an alternative fuel such as natural gas, liquefied natural gas, liquefied petroleum gas, biofuel, biodiesel, methanol, ethanol, and electricity.

NY RECs

New York Governor Andrew Cuomo (D) announced December 24 a \$250 million competitive solicitation administered by the New York State Energy Research and Development Authority to award contracts for the purchase of renewable energy credits generated by renewable power generation facilities. RECs purchased under the RFP will be used to comply with the state's Renewable Portfolio Standard target of 30 percent by 2015. Awards will be issued this summer.

LAX to Eliminate Free EV Parking

Los Angeles International Airport announced last week that it would end a free parking incentive offered to electric vehicle owners in March. The program, which provided free parking for up to 30 days to electric vehicle owners, faced growing competition for the limited number of spaces offered.

Miscellaneous

ICT GHG Modeling

Researchers from the Center for Energy-Efficient Telecommunications at the University of Melbourne and Bell Labs published an article January 2 in the Environmental Science and Technology journal demonstrating new models for measuring GHG emissions and energy consumption related to the information and communications technology industry. The study, "Methodologies for Assessing the Use-Phase Power Consumption and Greenhouse Gas Emissions of Telecommunications Network Services," concludes that the models are designed to evaluate information from data centers and similar infrastructure to help companies reduce their carbon footprint; the industry currently produces more than 830 MMT CO₂ per year.

Corporate Sustainability Guides

The World Resources Institute and the Network for Business Sustainability released guides December 12 and 16 to assist companies in increasing corporate sustainability. The first, Sustainability Strengths, Weaknesses, Opportunities, and Threats, is intended to help companies encourage employees, suppliers, customers, and others to become more sustainable. The second, Innovating for Sustainability: A Guide for Executives, details 39 business practices to help companies become sustainable.

Politics of Climate Change

A January 2 study published in Nature found that though several factors may play a role, politics is the primary factor in determining the likelihood of limiting global warming to the international goal of 2 degrees Celsius. The study, "Probabilistic Cost Estimates for Climate Change Mitigation," concluded that without climate mitigation technologies like carbon capture and storage, the probability of staying below the 2 degree Celsius limit decreases to 50 percent. The report indicated that a significant decrease in energy demand through improvements in energy efficiency would make it likely that the goal could be reached with a carbon price of \$10 to \$15/MT.

TN Coal Ash Spill Study

Researchers from Duke University, the University of Illinois at Urbana-Champaign, and the U.S. Geological Survey released a study December 18 finding that the December 2008 spill of over five million cubic yards of coal in Kingston, Tennessee increased mercury levels in the sediments of proximate waterways but did not impact surface water quality in the area. The study, "Environmental Impact of the Tennessee Valley Authority Kingston Coal Spill," concluded that existing bacteria in the sediments near the Tennessee Valley Authority facility mixed with the spilled coal ash to convert approximately 2 percent of mercury to methyl mercury.

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