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Environmental and Energy Legislation in the 112th Congress

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When Barack Obama succeeded George W. Bush in January 2009, backed by solid majorities in both the House and the Senate, the country seemed poised for the first major environmental legislation since 1990, the year of the Oil Pollution Act and the 1990 Clean Air Act amendments. Under the leadership of Rep. Henry A. Waxman (D-CA) and Rep. Edward Markey (D-MA), the House passed a comprehensive climate change bill based on an economywide cap-and-trade system. The House also passed a bill to lift oil spill liability caps and adopt additional reforms in the wake of the Gulf of Mexico spill. But both bills languished in the Senate.

The 112th Congress, elected on November 2, 2010, may run swiftly in the opposite direction. The House now has a Republican majority, and while the Democrats still control the Senate, they lack the sixty votes needed to approve a bill. Even many Democratic senators oppose much of what had been their party's environmental platform just two years ago.

The congressional environmental agenda for the next two years centers on fighting President Obama's efforts to use existing legislation to address climate change. The U.S. Environmental Protection Agency is resolutely moving forward with using the authority under the Clean Air Act that the U.S. Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), declared it has to regulate greenhouse gases. The Republican leadership in both chambers has vowed to attempt to block these attempts. President Obama has said he would veto such an attempt, but there may be efforts to attach language blocking these EPA actions to an appropriations bill or debt ceiling limit bill that would be difficult to veto, to use the Congressional Review Act, and to find other parliamentary techniques.

This situation resembles an episode in 1979 under another Democratic president, Jimmy Carter. The Supreme Court had held in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), that the Endangered Species Act (ESA) barred construction of the Tellico Dam because it would harm an endangered fish, the snail darter. Senator Howard Baker (R-TN) managed to attach a clause to an appropriations bill that directed the TVA to build the dam, notwithstanding the ESA and any other law. President Carter reluctantly signed the bill out of concern that a veto could undermine his other legislative priorities, such as a Panama Canal treaty.

There is some chance that modest energy legislation might succeed in the 112th Congress. Bipartisan support exists for a "clean energy standard"—a requirement that electric utilities generate a certain minimum percentage of their electricity from clean energy sources. Prior versions of such legislation sought to limit the eligible sources to renewables, such as wind and solar; it now appears that to have any chance of passage nuclear power and clean coal technology (should that be developed on a commercial scale) would also have to be included among the legislatively designated "clean energy" sources.

Natural gas has many friends on Capitol Hill, and bills supporting natural gas-powered vehicles, as well as electric vehicles, may be enacted. There is also active discussion of tighter energy efficiency standards for appliances, lighting, and industrial sources, though there are some in Congress who oppose such standards. In particular, those opponents have risen to defend the manufacture of and seek to maintain the use of incandescent light bulbs, which are on their way out due to their energy inefficiency as compared to fluorescent bulbs.

Also possible is legislation that would adopt a consumer rebate program or extend tax credits to homeowners who take energy efficiency measures.

For the most part, however, it appears that the principal action on the climate front over the next two years will be at the state level. California voters soundly rejected a measure that would have substantially delayed implementation of that state's landmark climate change law, A.B. 32, and they elected a governor, Jerry Brown, who supports this law. On December 16, 2010, using the power granted by A.B. 32, the California Air Resources Board adopted a cap-and-trade program. It covers carbon dioxide, methane, and several other pollutants. The first compliance period will begin in 2012 and will apply to large processing facilities, electricity-generating facilities in California, electricity importers, and suppliers of carbon dioxide. They will have to acquire a sufficient number of emission allowances or offset credits.

California will thus join the ten northeastern and mid-Atlantic states of the Regional Greenhouse Gas Initiative (RGGI) in adopting trading for greenhouse gases. The California program has much broader scope than RGGI (which only covers carbon dioxide from electric power plants), and, thus, its successes or failures will be observed very closely.

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