

Environmental action and the 114th Congress: Movement at the margins

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Change, inevitably, has come to Congress. While many pollsters foresaw the Republican Party's recapture of the Senate in the midterm elections, Congress had previously experienced a tectonic jarring of the House's senior leadership through the surprise defeat of Eric Cantor and the rapid reshuffling of Republican Party stalwarts. And, of course, the brewing 2016 presidential election has begun to color debates and skew proposed legislation in both chambers. With the elections complete, attention has focused now on predicting the actions of a last-gasp lame duck Congress and the brewing agenda of newly ascendant Republican leadership in the next session. To chart likely congressional paths that might affect members of the Section of Environment, Energy, and Resources, the Special Committee on Congressional Relations reached out to our leadership and subject matter expert members to explore which environmental, energy, and natural resource issues will likely receive significant attention at the congressional committee level. Their comments also identified issues that have the potential to reach the floor in one or both chambers, and, more generally, whether any issue has the potential to yield legislative fruit over the next year.

Virtually all respondents, authors included, recognized that the close margins in both houses, ongoing budgetary pressures, and the historic levels of acrimony between the parties will likely make substantive legislation difficult to achieve on any issue in the lead-up to the 2016 elections. While the current partisan rancor may poison major efforts on any significant bipartisan legislation, much room remains for important environmental work in the legislative margins where initiatives outside the public spotlight have the potential to generate substantive results.

Muddling through midterms

The shift to Republican control in the Senate and continued consolidation of Republican leadership in the House in one sense simply confirms conventional wisdom and continues the historical trends of midterm elections, the waning popularity of a sitting second-term president, and early polling data. The election results also reflected some new realities. The Obama administration suffers from strikingly low approval ratings at levels similar to the latter years of the George W. Bush administration, but Congress is even more astoundingly unpopular. Current polling data show that Congress "enjoys" an approval rating of only 15 percent and its disapproval ratings have climbed to an astronomical 83 percent. These low figures undermined the traditional advantages of incumbency and especially damaged the hopes of

Democrats because their party held the majority of seats up for election this year. Five of those seats in particular placed Democratic incumbents in the withering glare of state electorates who voted strongly in favor of Republican candidates in the most recent national elections.

As the levers of power in the Senate shift to the Republicans, prospects for legislative action will face two important consequences. First, lame duck sessions can offer surprising opportunities for legislative activity by members who need no longer fear future elections or political repercussions (CERCLA, the Comprehensive Environmental Response, Compensation, and Liability Act, for example, passed in a lame duck session). The chances for substantive legislative action would depend on whether House leadership prefers to hold up significant bills until the arrival of the Republican Senate and whether the White House wishes to strike any pragmatic deals before a change-over to avoid that roadblock. Pushing aside election-night bipartisan platitudes from both parties, the high levels of partisanship and acrimony between the parties do not offer strong hope for repeating these historical precedents with current prospects. Second, while still longshots, energy issues have the best shot at movement in the lame duck Congress. Potential candidates for movement include approval of the Keystone Pipeline, renewal of the Federal Renewable Electricity Production Tax Credit (PTC), revisions to federal siting requirements under the National Environmental Policy Act (NEPA) for energy and transportation projects, and changes to the federal oil and gas export policy.

The upcoming shifts in Senate committee chairmanships may also open new lines of communication and promise new working relationships that could support legislative action. The Senate Natural Resources Committee, for example, will see the gavel go to Sen. Lisa Murkowski (R-AK) from Sen. Mary Landrieu (D-LA) (assuming Sen. Landrieu wins her re-election runoff race). This switch will likely continue the Committee's strong focus on energy and oil and gas development issues. The Senate Energy and Public Works (EPW) Committee, by contrast, will see Sen. Jim Inhofe (R-OK) take over from Sen. Barbara Boxer (D-CA). While this committee has suffered more than most from a strongly partisan atmosphere, Sen. Inhofe's new role may promise a more workable relationship between the EPW Committee and the House Energy and Commerce Committee.

The vagaries of electoral cycles could also help temper some of the partisan stances that a newly ascendant Republican majority might take in the Senate. The same confluence of historical forces that victimized the Democrats in this electoral cycle—a majority of contested seats coming up within their party and the lack of a national election to spur voter turnout—will turn against the Republicans in 2016. The Democrats faced the challenge of defending 21 seats to the Republicans' 15 in November 2014, but the Republicans will have 24 seats exposed in the 2016 election versus the Democrats' ten seats. With a contested presidential election heading the ballot to excite voter turnout, the window of Republican supremacy in the Senate may last only a short 24 months. The prospect of a potential quick return to minority status may inspire the Senate Republicans to wield a gentler hand as the majority party during the next two years.

Presidential partisanship

As both parties eye the 2016 presidential race, political posturing will likely shut down any realistic prospect of significant bipartisan environmental legislation that might yield a "win" which could affect the presidential prospects for either party.

We might nonetheless see activity at the committee level. Political posturing will likely spur legislative efforts to highlight wedge issues and disputes that will motivate the base for each party. The Congressional Review Act (CRA) will enjoy a renaissance in this respect as Republicans will likely target particularly galling EPA actions, including the administration's suite of rules to regulate greenhouse gas emissions from the power sector under the PSD (Prevention of Significant Deterioration) and NSPS (New Source Performance Standards) programs, its update to the refinery MACT (Maximum Achievable Control Technology) rule and residual risk assessments, and EPA's recent interpretive rule on "waters of the United States." The CRA would allow legislators to introduce a joint resolution in disapproval of a major regulation that would receive expedited consideration in both chambers. The CRA also reduces the prospects of a Senate filibuster because that chamber has typically considered motions to consider resolutions under a statutory time limit as privileged and not subject to debate or amendments. R. Beth, Congressional Research Service, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, CRS Rpt. 7-5700 at p. 12 (Oct. 10, 2001). While the CRA almost certainly cannot provide a vehicle to survive a presidential veto, it can reduce the threat of a Senate filibuster and allow Republican members to hold hearings and bring symbolic votes to disapprove contentious environmental regulations.

Democrats in turn will be playing a largely defensive game in 2015 to protect EPA, the Department of Energy, and the Department of the Interior from aggressive efforts by the Republican majority to challenge the administration's priorities in these areas through hearings, votes, and appropriation actions. Ultimately, however, by their very controversial nature, these efforts will almost certainly die long before maturing into law—either through Senate inaction during the lame duck 113th Session or via presidential veto during the 114th Session.

Activity despite legislative rigor mortis

Given the likely continuing partisan impasse and increasing friction in anticipation of the presidential election, the best prospects for accomplishment lie outside the law-making limelight. While these opportunities will require a rare overlap of modest scale, practical need, and low profile, a few categories of non-legislative congressional activity might lead to concrete environmental results.

Funding legislation and appropriations. The House's constitutional prerogatives will allow it to target particular regulatory actions by attaching spending provisos to appropriations legislation. While House leadership has foresworn opaque funding riders, that protocol only requires sponsors to identify themselves and limit the number and scale of particular appropriation rider requests. Possible targets of appropriations riders would likely include some of the high-profile regulatory actions we have described above such as

- greenhouse gas emission limits for the power sector,
- the expansion of Clean Water Act jurisdiction through the regulatory clarification of its definition of "waters of the United States," and
- attempts to regulate hydraulic fracturing activities through limits on methane emissions and green completion requirements.

The unification of Republican leadership over both congressional chambers also opens the doors to more aggressive legislative activity over appropriations legislation. The federal government has labored for many years over inconsistent budgeting and a paralysis of taxation and spending policy, and this impasse has forced Congress to finance federal governmental actions through comprehensive continuing resolutions and omnibus appropriations bills. This dynamic could change with Republicans in charge of both houses, and as a result, the federal appropriations process could return to its former practice of funding various federal agencies through 12 separate appropriations bills. If so, Congress could avoid the risk of a presidential veto of a continuing resolution—which would shut down the entire federal government and likely benefit the White House—by limiting controversial provisions to the funding bill for a particular agency. As a result, a presidential veto would shut down only the agency at issue, and the Republicans would face much lower risks of political damage from its base if, for example, President Obama's veto of an appropriations bill shut down EPA.

Appointments and ratifications. In addition to passing legislation (rarely) and funding governmental activities (haltingly), Congress also has the constitutional authority to confirm certain appointees and judicial nominees. Faced with a unified Congress controlled by the opposing party, the White House may find itself obligated to nominate centrist or even rightward-leaning candidates that might win consent before President Obama's term expires. In addition, its constitutional prerogative to ratify treaties will likely turn the Senate into a Golgotha for any initiatives by President Obama for international agreements on climate change or environmental concerns.

Oversight. While legislative action frequently falters, oversight always carries on. With the Republican Party controlling both chambers, Congress may explore more creative and aggressive avenues of oversight hearings without concerns over competition or objection between chambers. We have already begun to see an expansion of the traditional sphere of oversight of governmental activities to now include alleged improper influence by non-governmental environmental groups in EPA's rulemaking process.

Fields of interest

Given these shifts in legislative dynamics and possible avenues for action, what environmental and energy topics will likely draw the most favorable congressional attention? After surveying our fellow Section members and congressional contacts, some likely candidates leap to the fore.

Regulatory reform. Efforts to promote transparency and cost efficiency in regulations can arguably draw support from both aisles. This approach could focus on the regulatory process itself without evoking fights over particular rules, but it will undoubtedly result in greater procedural burdens for the passage of significant future environmental regulations.

Energy efficiency and export policy. The Shaheen/Portman energy efficiency bill has consistently held moderate support in both chambers, but has been unable to rise above the partisan legislative posturing to reach a vote. If the parties can move beyond the tactical posturing, this bill enjoys cross-over support and could see legislative movement, particularly if the Democrats are willing to pair the bill with limited action to revisit federal natural gas export restrictions.

Reform of the Toxic Substances Control Act (TSCA). Both the House and Senate Republicans have signaled interest in working with Democrats on a bipartisan TSCA reform bill, and centrist Democrats and some environmental nongovernmental advocacy organizations have reciprocated. Barbara Boxer, the current EPW Committee chair, has not shared in this positive sentiment, and she has expressed continued concerns over numerous aspects of the bipartisan bills submitted to date. A change in Senate leadership could improve the prospects for committee and floor votes on a bill, but it likely would not address the possible risk of a filibuster.

In short, at the committee and perhaps even the chamber floor level, we will likely see plenty of partisan activity and jockeying with respect to energy and environmental policy over the next 18 months. As Section Chair Steve Miano has noted, “environmental issues will continue to play significantly in the ongoing debate between political parties pre- and post-election, with each side continuing to predict dire consequences resulting from both action or inaction.” Dire consequences notwithstanding and with legislative paralysis continuing to shadow the Hill, Congress will play an important role over the next two years—even if it does so from the margins.