

GONZALEZ
SABIO
HARLAN

Environmental Memo

November 10, 2010



Ben C. Grawe, Esq.

www.gshllp.com

(414) 277-8500

Want more
information on
this topic?

[CLICK HERE!](#)

[Join Our Mailing List!](#)

Change is in the Air: What the 2010 Mid-Term Elections Mean to Greenhouse Gas Regulation

By Ben C. Grawe, Esq.

Call it a referendum on the Obama Administration or simply a reaction to the sluggish economic recovery, but one thing is clear from the recent election - passage of any major environmental or energy bill addressing greenhouse gases is in serious jeopardy. Although Republicans failed to take control of the Senate, they gained at least six seats there and ten times as many in the House, where the GOP now enjoys a healthy majority. As President Obama has since conceded, many of the newly elected Republicans ran on opposition to a cap-and-trade approach for managing carbon emissions, and several of the Democratic incumbents who survived the mid-terms would oppose the same. This means that what once appeared to be an open road to some form of a climate change bill has now closed, or at least is facing major construction delays.

Also facing significant challenge is the U.S. Environmental Protection Agency's ("US EPA") proposed regulation of greenhouse gases, which was well on its way to becoming reality. Facing a legal mandate from the Supreme Court in the *Massachusetts v. EPA* decision of 2007 to regulate certain gases as pollutants, the agency has taken significant steps over the last two years to authorize, substantiate and promulgate these rules. This began with a run-up to US EPA's December 2009 "Endangerment Finding" under section 202(a) of the Clean Air Act (the "Act"), a March 2010 decision (known as the "Johnson Memo Reconsideration"), which concluded that greenhouse gases are subject to regulation under the Act's Prevention of Significant Deterioration ("PSD") program and a June 2010 "Tailoring Rule" that limits the applicability of PSD through a multi-step phase-in approach to only the highest emitting sources for a specified period of time, as opposed to all greenhouse gas emitting sources at the 100/250 tons-per-year (depending on the source category) statutory thresholds. Additionally, in September of

**GONZALEZ
SAGGIO
HARLAN**

Office Locations:

Arizona
California
Georgia
Illinois
Indiana
Iowa
Nevada
New Jersey
New York
Ohio
Tennessee
Washington D.C.
Wisconsin

www.gshllp.com

this year, US EPA proposed rules to ensure that in the 13 states that do not have authority to issue PSD permits to greenhouse gas-emitting sources, either the State or US EPA will have the authority to issue PSD permits by January 2, 2011. The US EPA's conclusion determined that those state's implementation plans are "substantially inadequate" to comply with the Act's requirements, and because they must do so, US EPA created a response action known as a "SIP Call."

Not surprisingly, in response, several petitions for judicial review of US EPA's actions have been filed by states, environmental groups, industry groups, as well as individual companies. These petitions will likely take on a new strength and focus, as Republican Attorney Generals took over five states in the election; Republican Governors took ten; and industry groups, such as the National Association of Manufacturers, are feeling reinvigorated by the results. On top of that, many Republicans, the incumbents, and those newly elected, feel as though US EPA has been overstepping its bounds lately, and so will provide significant resistance and scrutiny to the proposed actions.

Despite the new political climate, unless the courts overturn the proposed greenhouse gas rule or Congress steps in, the regulation will go forward come the new year, and both the PSD and Title V programs will automatically apply to major sources - subject, of course, to US EPA's proposed Tailoring Rule. Is this likely? It is difficult to say, but perhaps not according to the current timeline. Will the rule materialize eventually? We believe it probably will. There is still a Supreme Court mandate to regulate greenhouse gases as a pollutant under the Act. And there is still interest in drafting some meaningful energy legislation. Consider what happened in California last week. Voters defeated Proposition 23, an extremely well-funded effort to stop the state's sweeping global warming law that would set strict limits on greenhouse gas emissions and create a cap-and-trade system for pollution permits. They also re-elected Democrats Barbra Boxer to the House and Jerry Brown as Governor. Unlike Las Vegas, history has shown that not all that happens in California, stays in California. Regulations there could signal a bellwether for future climate change regulation. It just may take a little longer - and may be a little bloodier, politically - than previously thought.

For further information about the breadth and impact of this issue, please contact Ben Grawe at (414) 277-8500 or Ben_Grawe@gshllp.com. For further information on the Gonzalez Saggio & Harlan LLP Environmental Team, please contact Ned Witte, Team Chair, at (414) 277-8500 or Ned_Witte@gshllp.com.

The Environmental Memo is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion

on any specific facts or situations. For further information on your own situation, we encourage you to contact the author of the article or any other member of the firm. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

Copyright 2010 Gonzalez Saggio & Harlan LLP. All rights reserved.