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Energy Legislation And Regulation To Watch In 2015

By Keith Goldberg

Law360, New York (January 02, 2015, 4:23 PM ET) -- From landmark greenhouse gas rules for power plants from the U.S. Environmental Protection Agency to an early showdown between Congress and the White House over the controversial Keystone XL pipeline, attorneys will have a full plate of energy-related regulation and legislation to sink their teeth into this year.

Here's what attorneys will be watching in 2015.

EPA's Power Plant GHG Rules

The EPA's **Clean Power Plan** is one of the most sweeping regulations ever crafted by the agency, if not the most sweeping: a proposal to slash greenhouse gas emissions from existing power plants by 30 percent by the year 2030. The EPA received more than 1.6 million public comments on the rule and is scheduled to release a final version in June.

"That's an issue that has the entire industry concerned and wondering about what the final rule is going to look like," said Amy Koch, who leads Reed Smith LLP's energy regulatory team.

Several states and the coal industry have already **launched legal challenges** to the linchpin of President Barack Obama's climate change policy. With Republicans in control of both houses of Congress, expect legislative efforts to block the rule's implementation as well.

"There's been some talk about the possibility of using the Congressional Review Act if EPA actually promulgates the regulation, that allows Congress to take a vote on a regulation and vote it up or down," said former Federal Energy Regulatory Commissioner Suede Kelly, who co-chairs Akin Gump Strauss Hauer & Feld LLP's energy regulation, markets and enforcement practice. "But in all likelihood, the president would veto it."

Assuming the EPA finalizes the rule, the questions will turn to its implementation. The rule will likely send many coal-fired plants into retirement, leaving regulators such as FERC to wrestle with how to manage those retirements while maintaining the reliability of the U.S. electric grid.

"How do you do that in an orderly fashion?" Morgan Lewis & Bockius LLP partner Stephen Spina said in a December interview. "I think that's going to become more of an issue at FERC next year: How do we handle the EPA rules' impact on coal generation and how does FERC ensure that reliability doesn't suffer?"

But before the EPA finalizes its Clean Power Plan, it has to finalize its rule capping greenhouse gas emissions **from new power plants**. The agency claims that new coal-fired plants would be able to meet the new limits by installing carbon capture and sequestration technology, but the rule's opponents claim the technology isn't economically viable.

"The big question is: Is EPA going to try and claim that CCS has been adequately demonstrated, or back off on that rule?" said Bracewell & Giuliani LLP partner Jeff Holmstead, a former EPA air administrator.

New National Ozone Standards

If the EPA's greenhouse gas rules for power plants are the most controversial regulations set to be finalized in 2015, the agency's tightening of national ozone standards is a close second, experts say.

"If it weren't for the Clean Power Plan, the new ozone standard will certainly be the most costly rule EPA has ever done," Holmstead said.

In floating the updated National Ambient Air Quality Standards, or NAAQS, **in November**, the EPA proposed a range between 65 parts per billion and 70 parts per billion, but will also consider comments on setting ozone levels as low as 60 parts per billion. The EPA must finalize the standards by October 2015.

The updated requirements would impose significant costs on industries including electricity, manufacturing and transportation. The EPA pegged the annual compliance costs of \$3.9 billion for a 70 parts per billion standard and \$15 billion for a 65 parts per billion standard, though the agency insists those costs would be outstripped by the health benefits.

But the biggest impact may be felt by the state and local governments that will have issues meeting the new ozone standards and be forced to impose new regulations in order to attain them, experts say.

"It's possible the states will be imposing additional requirements to reduce ozone precursors that include controls on existing industrial sources," said Karen Winters, who heads Squire Patton Boggs LLP's environmental practice. "The changes to NAAQS have ripple implications though a number of Clean Air Act programs, and that's why there a concern over the revised standards."

LNG and Crude Oil Export Legislation

While there figures to be plenty of sparring between the Republican-controlled Congress and the White House over EPA regulations in 2015, the two camps could find more common legislative ground when it comes to unlocking more exports of U.S. oil and gas, experts say.

Congress has introduced several bills that would speed up the permitting process for exports of liquefied natural gas, though they've never made it to Obama's desk. Meanwhile, the U.S. Department of Energy has signed off on several LNG export projects since Ernest Moniz became the secretary of energy in 2013.

"It was a bipartisan issue in the last year and a half, both congressionally and in the executive branch," K&L Gates LLP partner David Wochner said in a December interview. "I think that it would not be surprising to find legislation to get through both houses [of Congress] on LNG exports in the coming year, given the support it's had in the past."

A thornier prospect is advancing legislation that would relax or repeal the decades-old ban on crude oil exports, which has not only split lawmakers on Capitol Hill but the U.S. petroleum and refining industries as well.

Still, with Republicans in control of Congress — Rep. Joe Barton, R-Texas, introduced a bill that would repeal the ban in December — and the White House indicating that it's willing to examine the issue, the prospects of some legislative change are as good as they've ever been, according to K&L Gates partner Tim Peckinpaugh, who manages the firm's political action committee.

"The next two years will be a good window," Peckinpaugh said. "It won't happen overnight. But you have great atmospheric conditions that make it doable."

Keystone XL Legislation

The Obama administration is taking its time in deciding whether to issue a presidential, cross-border permit for the Keystone XL pipeline, which, if completed, would transport tar sands oil from Canada to the Gulf Coast. The Republican-controlled U.S. House of Representatives **advanced**

legislation in 2014 that would bypass White House approval and greenlight construction of the controversial project, but **the bill died** in the Democrat-controlled U.S. Senate.

With the GOP now controlling both houses of Congress, not only will a Keystone bill be resurrected, it has a stronger chance of making it through Capitol Hill.

Incoming Senate Majority Leader Mitch McConnell, R-Ky., said in December that a bill approving construction of the Keystone XL pipeline will be first bill up for consideration when the Senate reconvenes. And with a handful of Senate Democrats expressing support for the project, that increases the likelihood that approval legislation could make it to Obama's desk.

While the Obama administration hasn't dismissed Keystone legislation out of hand, the White House **has stressed** that it's committed to the existing process in which the U.S. Department of State must review and issue a cross-border permit for the project.

"Congress will likely have the votes, the question is: will the president veto it?" Peckinpugh said. "That's a good early test as to what you'll see play out in energy legislation in general."

Endangered Species Listings

The oil and gas industry will be closely watching what the U.S. Fish and Wildlife Service does as the agency ramps up its efforts to designate species under the Endangered Species Act. Several upcoming listing decisions could put a significant crimp in energy development and courtroom battles have already broken out over the FWS' methods.

On the legislative front, the **recent \$1.1 trillion omnibus spending bill** passed by Congress includes a rider barring the FWS for putting the greater sage-grouse, whose habitat covers a large area in several energy-rich Western states, on the endangered species list.

While the greater-sage grouse has drawn the most attention, Vorys Sater Seymour and Pease LLP partner Jon Airey says an endangered listing for the northern long-eared bat, which has an even wider range, could be an even bigger roadblock for energy development.

"That could have a significant regulatory impact on all economic development in [many states], depending on what they do," said Airey, who also serves as the law committee chair for the Independent Petroleum Association of America and general counsel to the Ohio Oil and Gas Association.

Production Tax Credit Renewal

The U.S. wind industry got its annual reprieve when Congress **passed a tax extenders bill** that retroactively revived the renewable production tax credit. But the revival came with just over two weeks left in 2014, leaving wind developers hoping for a similar or more lasting revival in 2015.

Despite GOP control of Congress, many Republicans from wind-heavy states back the PTC. Still, experts say any lasting resurrections of the credit may have to come within broader tax reform legislation that addresses a number of tax breaks, which is a heavy lift.

"Do they repeal the [renewable] investment tax credit or do they repeal some of the other targeted provisions, whether they're permanent or temporary?" said Greg Jenner, a former head of the U.S. Department of the Treasury's tax policy office who co-chairs Stoel Rives LLP's energy team. "If the PTC has expired at the end of 2014, well, that means they don't raise revenue, it's already expired. So how do they start to raise revenue if they are lowering tax rates?"

Tax reform is all about lower rates, but a broader tax base, which means you're trading off targeted incentives such as the PTC for more even application of lower rates across the board, according to Jenner.

"It becomes a question of what gets traded off and will Congress make that trade-off," Jenner said. "Once things are on the chopping block, that's when the fighting starts."

--Editing by Katherine Rautenberg and Rebecca Flanagan.

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