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# **Election Likely to Affect EPA Litigation, Judicial Nominations**

By **LAWRENCE HURLEY** of

The repercussions of Republican successes in Tuesday's midterm elections are likely to be felt not just on Capitol Hill but also in courtrooms.

Legal experts say the impact on environmental and energy issues will be seen both in ongoing litigation, including over the U.S. EPA's endangerment finding over greenhouse gases, as well as judicial nominations.

House Republicans, now in the majority, are hoping to push legislation preventing EPA from regulating greenhouse gases while also frustrating the agency's attempts to pass new rules by conducting aggressive oversight hearings (*Greenwire*, Nov. 3).

Both strategies could affect the industry-backed lawsuits challenging EPA's endangerment finding that are currently before the U.S. Court of Appeals for the District of Columbia.

On judicial nominations, the Democrats' much-reduced majority in the Senate puts in doubt the confirmation prospects of various nominees who have attracted criticism from Republicans. It could also prompt the White House to seek more Republican input on future nominees.

For environmentalist and business groups active in courts that hear a lot of environmental cases, such as the D.C. Circuit and 9th U.S. Circuit Court of Appeals, the stakes are high.

When it comes to litigation, most EPA watchers are concentrating on greenhouse gas cases. In the immediate aftermath of the election, many EPA watchers predicted that House Republicans would seek to slow or even halt altogether EPA's efforts to regulate greenhouse gases via the Clean Air Act.

Those efforts mirror the strategy of industry groups, such as the U.S. Chamber of Commerce, to challenge every greenhouse gas-related rule in court.

For David Doniger, policy director of the Natural Resources Defense Council's climate center, the litigation has always been something of a sideshow.

"These cases were filed because they wanted to show they cared enough to go to court," he said. Now that Republicans have greater muscle in both the House and Senate, they will hope to tackle EPA through legislative means, he added.

Opponents of the regulations could have better luck in Congress, Doniger said, because, unlike court papers, "you can say anything you want in a two-page lobbying letter."

The election came at a time when the litigants are fighting over whether the appeals court should stay EPA's plan to begin regulating greenhouse gases from factories and other major stationary sources of emissions on Jan. 2 (*Greenwire*, Nov. 2).

House Republican investigations and attempts to remove funding for EPA implementation of the endangerment finding could diminish the importance of the litigation, according to Jim Burling, director of litigation at the Pacific Legal Foundation, a California legal group that is often in opposition to environmentalists.

The litigation could end up being "less important than it was before" if Republicans are able to sway EPA policy, he said. If EPA conceded on some points, "it could moot out the litigation," he added, although he conceded that the Obama administration is unlikely to give ground easily.

Environmental groups are also expecting more challenges to EPA regulations via the courts.

Patti Goldman, vice president of litigation at Earthjustice, predicted industry-backed lawsuits against EPA similar to those on the endangerment finding.

"I have never seen as aggressive an industry response," she said during a conference call yesterday. "We are going to see more of that."

### **Judicial nominees**

As for judicial nominations, liberal advocacy groups have long complained about Republican obstruction of President Obama's picks even when they held 59 seats. With the number of Senate Democrats reduced to a bare majority come January, the chances of Republican leaders being able to win the 41 votes needed to filibuster a nominee have increased considerably.

Glenn Sugameli, who tracks judicial nominees from an environmental perspective for Defenders of Wildlife, said the onus is on Senate Majority Leader Harry Reid (D-Nev.) to push through pending nominations during the lame-duck session this month.

After the lame duck, Sugameli predicted that public dissatisfaction with Congress would

"increase pressure for Senate Republicans to get things done, especially as judicial vacancies have soared to over 100."

There are currently two vacancies on the D.C. Circuit, the court that handles challenges to EPA and other federal agencies.

The White House has so far only announced a nominee for one of the seats: Caitlin Halligan, a prominent appellate lawyer who currently serves as general counsel at the New York County District Attorney's Office.

There are four vacancies on the 9th Circuit with two nominees named. One of those nominees, University of California, Berkeley, law professor Goodwin Liu has attracted the most Republican criticism of all of Obama's nominees and faces an uphill battle to win confirmation.

Another post-election factor for the Obama administration to consider is that the membership of the Senate Judiciary Committee, which handles judicial nominations, will be different come January.

Sen. Russ Feingold (D-Wis.) lost his re-election battle, while longtime member Sen. Arlen Specter (D-Pa.) lost in the Democratic primary and Sen. Ted Kaufman (D-Del.) stood down after serving the final two years of Vice President Joe Biden's term. It is not yet known who will replace them on the committee.

There will also be a new ranking member to replace Sen. Jeff Sessions (R-Ala.), who is expected to become the senior Republican on the Budget Committee.

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