

GOP Gains May Put Energy-Permitting Pact On The Table

By **Keith Goldberg**

Law360 (November 16, 2022, 7:59 PM EST) -- The Biden administration faces new hurdles for its climate and energy policies with Republicans gaining control of the U.S. House of Representatives by a slim margin Wednesday as votes continued to be counted, but some Capitol Hill watchers spot an opening for a bipartisan breakthrough on legislation to speed up permitting for energy infrastructure.

A partisan split between Congress and the White House greatly decreases the chances of clean energy measures being passed, with increased scrutiny of President Joe Biden's climate policies. But recently enacted legislation, including the Inflation Reduction Act and Infrastructure Investment and Jobs Act, has already shoveled billions of dollars toward energy infrastructure development, which Biden has made a key plank of his overall energy policy.

"It clearly has interest from both Democrats and Republicans, and it'll be interesting to see — if it doesn't happen before the end of this Congress or only partially happens — if there's some bipartisan formula that can come together in the next Congress," said Van Ness Feldman LLP partner Kyle Danish, who works on energy development and environmental regulation.

Earlier this year, Sen. Joe Manchin, D-W.Va., who chairs the Senate Committee on Energy and Natural Resources, floated a permitting bill that, among other things, would speed up the approval process for pipelines and electrical transmission. However, Manchin pulled the bill amid resistance from fellow Democrats.

Meanwhile, Manchin's in-state colleague, Sen. Shelley Moore Capito, R-W.Va., proposed a bill that would go even further to accelerate the infrastructure permitting process, yet it had no chance of advancing in the current Congress. But now, Republicans have a chance to significantly weigh in on a permitting bill next year, though their House majority is razor-thin.

"I think the White House and some Democrats recognize the current environmental review and permitting system is serving as a bit of a roadblock," said Crowell & Moring LLP senior counsel Byron Brown, a former U.S. Environmental Protection Agency official and congressional staffer. "That's one opportunity for potential cooperation."

Not everyone is convinced a divided Congress will produce a deal on infrastructure permitting where Manchin's bill couldn't.

"It's hard to imagine that bill, or another bill substantially in that form, would gather enough votes to

pass the Senate," said Bill Scherman, who chairs Gibson Dunn & Crutcher LLP's energy regulation and litigation practice group. "The House Republicans will insist on meaningful permitting and [National Environmental Policy Act] reform, and the more effective it is, the less likely it will be to gain support among Senate Democrats."

Questions over how reliable a slender GOP House majority will be may also persuade lawmakers to take a crack at getting permitting legislation through this year as part of a broader spending bill, experts say.

"There could be bipartisan support in the Senate to get the omnibus spending package passed during the lame duck session, rather than deal with a fractious and unpredictable Republican majority in the House next year," Danish of Van Ness Feldman said. "In that event, Manchin might call on [Senate Majority Leader Chuck] Schumer to honor his pledge by appending the permitting reform language to the omnibus bill."

But Manchin, progressive Democrats and Senate Republicans have at least laid down markers that can serve as starting points for negotiations, said Frank Maisano, a senior principal for Bracewell LLP's policy resolution group.

"Permitting reform isn't something you would do off the cuff — it's going to have to be significantly invested in on both sides," Maisano said. "Where it ends up is a matter of how much people are committed to compromise and how serious they are about advancing these types of clean energy systems."

Experts say a shift in power in Congress, not to mention the passage of the Inflation Reduction Act, also means the Biden administration will likely focus more on executive branch actions, from the EPA finalizing greenhouse gas emission rules to the U.S. Securities and Exchange Commission finalizing climate change disclosure rules.

Holland & Knight LLP senior policy adviser Beth Viola, who served on the White House Council on Environmental Quality during the Clinton administration, said the White House will also likely focus on implementation of the IRA, from crafting regulations and guidance to setting up the programs that will award funds provided by the law.

"That has to be their priority: getting that money out the door," Viola said.

But administration officials will have to do that while wearing a path between their offices and Capitol Hill, where they will face a wave of fresh oversight from the GOP on both agency rulemakings and IRA implementation.

"I expect Republicans will be looking for the next Solyndra, to anticipate any wasteful spending in the IRA," Danish of Van Ness Feldman said, referring to the solar panel manufacturer that went bankrupt after receiving hundreds of millions in federally backed loans during the Obama administration. "I'm not sure how much money will actually move in the next couple of years."

Crowell & Moring's Brown, who has advised clients during previous political shifts in Congress, said federal agencies like the EPA need dedicated teams to deal with increased oversight demands if they want to ensure any regulations are finalized by the end of Biden's term in two years.

"They need to find a way to minimize the distractions and insulate the policy team from getting

distracted," Brown said. "You need dedicated response teams to manage that process. They're going to want the [EPA] air office, for example, to focus on their day job, writing regulations and guidance."

--Editing by Philip Shea.

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