



## ABC's Weekly Federal Legislative Update September 28, 2020

### Introduction

Congress returns to Washington tomorrow to negotiate the next COVID 19 aid package. The Senate will also take up the Continuing Resolution which will fund the federal government until December 11. The House has already passed the measure. Below is news from Washington, D.C.

### Administration

#### Renewable Fuel Standard

***The following article discusses the recent oral arguments held before the U.S. Court of Appeals for the District of Columbia.***

Marc Heller of [E&E News PM](#) wrote on September 25, "Ethanol industry lawyers urged a federal court today to force EPA to boost the amount of biofuel it requires refiners to blend with gasoline to make up for waiving the mandate for certain small refineries.

"In the latest legal challenge related to the renewable fuel standard to go before judges, the trade group Growth Energy said the environmental agency should be required to adjust overall annual volume requirements if it allows some refineries to sidestep the RFS requirements.

"EPA can't do nothing," Growth Energy lawyer David Lehn told the three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit in oral arguments for *Growth Energy v. EPA*.

"It's "imperative" that the court specifically instruct EPA to adjust annual volume requirements, if judges agree that the agency erred in granting exemptions without revisiting those annual volumes, Lehn said.

"Growth Energy's lawsuit — one of several RFS-related cases moving through federal courts — focuses on the small refinery exemptions EPA extends to companies that say the mandate imposes a financial burden, targeting the regulations for the 2019 compliance year. Some of those exemptions have been granted for prior compliance

years, and Growth Energy said they've undercut the annual volumes required by Congress and EPA regulations.

“Lehn's request reflects industry worries that EPA won't adjust the biofuel volumes without a specific court order. Growth Energy's chief counsel told reporters in a conference call that EPA has options, including adding the volumes to one year's mandate or doing so over time.

“Whether judges will agree with ethanol producers that EPA overstepped isn't certain, and judges asked Lehn if a challenge would have been more appropriate several years ago, when the agency reflected on the subject in rulemaking for 2011, for instance. The Clean Air Act includes a provision calling for 60 days in which to challenge the details of the proposed regulations, and judges questioned whether that requirement should apply in this situation.

“The issue appeared especially noteworthy to Judge Merrick Garland, a Clinton appointee.

“The questioning appeared to reflect EPA's argument that it made clear in 2011 and in subsequent years that the agency wouldn't adjust the annual biofuel standards to take the waivers into account.

"EPA has consistently taken that approach in every year since," Department of Justice attorney Tsuki Hoshijima said, arguing for EPA.

“The American Fuel and Petrochemical Manufacturers, joining the case in defense of the administration's stance, believes EPA isn't obligated to reallocate volumes bypassed through exemptions, a lawyer for the group, Elizabeth Boucher Dawson, told the court.

“Whether EPA's "approach" has the same force as a legal interpretation of the RFS's requirements was a point of questioning with judges, and Hoshijima said he sees the terms as interchangeable.

“Other legal challenges loom, including a case Growth Energy has filed against EPA's rulemaking for 2020. The case argued in court today may yield a decision in January, Growth Energy's chief counsel, Joe Kakesh, told reporters.”

#### [EPA Administrator Wheeler's Comments on California Electric Vehicle Goal](#)

***California Governor Gavin Newsome recently announced a proposal to ban sales of gasoline powered engines by 2035. The following story discusses EPA Administrator Andrew Wheeler's comments regarding that proposal.***

On September 24, Kevin Bogardus of [E&E News PM](#) submitted, “EPA Administrator Andrew Wheeler doubts California can reach its goal of only zero-emission cars and trucks on the road by 2035.

"In an interview this afternoon for the Concordia Summit, Wheeler said he doesn't think the public is ready for the Golden State proposal aimed to help combat climate change. He suggested the plan put forth yesterday by California Gov. Gavin Newsom (D) may be intended to distract from the devastating wildfires that have ravaged the state.

"I think it's more aspirational at this point, and probably more political, probably as a reaction to try to turn the attention away from their mismanagement of the forest fires in California," Wheeler said. "Electric vehicles are great. It's good to see more of them. But I just don't think that even the state of California can get to 100% by 2035."

"The EPA administrator said the agency's analysis of the prior administration's fuel economy standards found the public wasn't embracing electric vehicles to a great extent. EPA has replaced those Obama-era standards, weakening limits on greenhouse gas emissions for automobiles.

"I don't think any level of government, whether it be a state or the federal government, should dictate a particular technology to the public," Wheeler said. "People are free to buy an electric vehicle if they want. People are free to buy an internal combustion engine vehicle if they want."

"Wheeler also questioned whether China would stick to its pledge to end its carbon emissions by 2060. Yesterday the superpower announced its promise, putting it on a more ambitious climate path than the United States currently.

"They've made a lot of proclamations in the past that haven't panned out," Wheeler said, touting U.S. reductions in carbon emissions. "They've talked about how they're going to expand to renewables and have all this investment in renewables. They do invest quite a bit in renewables, but it's dwarfed by their fossil fuel consumption."

"Wheeler added, "We should take that not just with a large grain of salt, but with a shaker of salt."

## **Congress**

### [House Democrats Prepare New COVID 19 Relief Package](#)

***The below story contains an update on the House Democrat's latest legislative proposal to address the COVID 19 pandemic.***

E&E Daily reporter Manuel Quinones published on September 25, "House Democrats are assembling a slimmed-down COVID-19 relief package in a bid to revive stalled talks with the Trump administration.

"Speaker Nancy Pelosi (D-CA) has directed committee chairs to draft a new relief package between \$2.2 trillion and \$2.4 trillion.

“That amount makes good on Democrats' pledge to come down \$1 trillion from the \$3.4 trillion "Heroes Act" that passed the House in May.

“Pelosi and Senate Minority Leader Chuck Schumer (D-NY) have repeatedly called on the Trump administration to increase its offer in the talks by a similar amount.

“Treasury Secretary Steven Mnuchin and White House chief of staff Mark Meadows were negotiating from the \$1 trillion "Health, Economic Assistance, Liability Protection and Schools (HEALS) Act," unveiled by Senate Republicans in July before talks broke down in August.

“The new push comes as Pelosi has faced pressure from within her caucus, especially moderates facing reelection, to bring another relief bill to the floor before the elections.

Pelosi announced last week she will keep the House in session in October to pass a COVID-19 deal should one emerge.

“However, Majority Leader Steny Hoyer (D-MD) declined to commit to a vote on the new package next week, signaling it is in part to entice the White House back to the negotiating table.

"We're not entirely anticipating that at this point in time," Hoyer told reporters. "We're really focused on trying to get a negotiated deal, the reason being that a message bill is one thing but we want to get something signed so people get money."

“Asked what would be cut from the "Heroes Act" — which Pelosi and Schumer have used for negotiations with the Trump administration — Hoyer suggested some of the asks could be cut by shortening the relief time frame.

"My own view is that we're going to deal with all of the objects that we think need to be dealt with; maybe not as long a time, maybe not as much money because you're making an accommodation," he said.

"We're focused on a negotiation; we want to get a deal with Secretary Mnuchin and the Senate because we want to get people help, not just messages."

“The "Heroes Act" included biofuels and agriculture aid, and help for people with water and power bills. The Republican "HEALS Act" includes provisions on critical minerals and mine permitting, along with energy assistance.

#### GOP response

“House Minority Leader Kevin McCarthy (R-CA) was underwhelmed by news of a new pandemic relief package.

"It shows again she's not serious about getting a COVID relief bill, and she's just playing politics," McCarthy told reporters yesterday.

"He called on Democrats to sign a discharge petition being circulated by Republicans, which would allow for a bill with additional small-business relief to come up for a vote.

"Senate Majority Whip John Thune (R-SD) said yesterday he hoped widespread airline layoffs expected next month could help bring the two parties together on a relief measure that includes areas of general agreement, including small-business help and unemployment assistance.

"I think there's a deal there," Thune told reporters yesterday. "But right now they're dug in, and we'll see. My sense is that both sides realize something's gotta be done on the airlines or we're going to have a lot of people unemployed about a week from now, and maybe that'll be the thing, the impetus that'll bust this loose."

"However, Thune said that once the Senate approves a continuing resolution — which cleared a procedural hurdle yesterday and is expected to be done by Wednesday — the chamber is likely to clear out for most of October except for members of the Judiciary Committee, which is expected to begin hearings on President Trump's upcoming nominee to the Supreme Court the week of Oct. 12.

"I suspect that after next week for the most part, unless you're on the Judiciary Committee, most members are probably going to go back and those that have to campaign get out and campaign," he said."

## [Senate Agenda](#)

***The following story discusses the latest Senate agenda.***

George Cahlink and Geof Koss of [E&E Daily](#) wrote on September 24, "The Senate may head for the campaign trail as soon as this week after passing legislation to avert a government shutdown and not return until mid-October for hearings on President Trump's Supreme Court pick.

"Senate Majority Leader Mitch McConnell (R-KY) said yesterday that the chamber would vote "as soon as it can" on the House-passed stopgap spending legislation that would fund federal agencies at current levels through Dec. 11.

"Without the stopgap, known as a continuing resolution, a government shutdown would occur when the new fiscal year begins next Wednesday.

"I am optimistic that, with bipartisan cooperation, we'll be able to make law well before the government funding deadline at the end of this month," said McConnell.

“Besides funding, the CR would provide one-year extensions, until Sept. 30, 2021, of federal surface transportation programs and the federal flood insurance program, which also expire next week.

“Democrats also attached a provision that would ban any farm payments to petroleum refiners. They were concerned that the White House would use the money to help offset biofuel blending costs.

“Senate Majority Whip John Thune (R-SD) said that once the CR is done, the Senate might be in recess to allow senators time to go home and campaign. Republicans are defending far more competitive seats this cycle than Democrats.

"If we wrap up the CR, then yeah, we probably should be done for at least a while, until something pops on one of those other issues," said Thune referring to the expected Supreme Court nomination and also a long-shot deal on pandemic recovery legislation.

“Senate Appropriations Chairman Richard Shelby (R-AL) said the CR vote could slip into next week, suggesting McConnell may want to push more nominees.

#### Energy bill

“Senate Energy and Natural Resources Chairwoman Lisa Murkowski (R-AK) and ranking member Joe Manchin (D-WV) have been looking for room for their energy reform package, S. 2657.

“The Senate leaving this week could mean the legislation may have to wait until the lame-duck session, when the political calculus is likely to change.

“Sources told E&E News that Senator Mike Lee (R-UT) is pushing for a vote on at least one of his amendments to the bill, the latest in a series of hurdles for getting the measure on the floor.

#### Supreme Court timing

“The next phase of the Supreme Court fight will begin when President Trump nominates a replacement for late Justice Ruth Bader Ginsburg on Saturday afternoon.

“The Senate Judiciary Committee is expected to begin several days of confirmation hearings the week of Oct. 12, although panel member John Kennedy (R-LA) told reporters yesterday that the schedule "could change."

“That schedule would provide both sides about two weeks to prepare for the high-profile hearings, which Kennedy said was enough time.

"I want to hold it in a manner that gives sufficient time for everybody to get ready; that includes the nominee, but also Judiciary Committee members," Kennedy told reporters yesterday.

"I have to have time to research the nominee's record, to read any opinions that any nominee has written. I spend an extraordinary amount of time getting ready for these hearings and even more getting ready for a Supreme Court hearing."

"McConnell said Tuesday that he will make a decision on the confirmation vote after Trump's nominee is approved in the Judiciary Committee, although senators from both sides are anticipating a vote before the Nov. 3 elections.

"Senator Roy Blunt (R-MO), a member of Senate leadership, said the chamber should have "plenty of time" to fill the vacancy before the presidential contest, adding that it should not be "drug out."

"Senator Dick Durbin (D-IL), a senior Judiciary Committee member, said an expedited schedule may lead Republicans to depart from past customs, as he said the GOP did when it "short-circuited" the background check of Supreme Court Justice Brett Kavanaugh in 2018.

"The notion that we can in four or five weeks do this anticipates a lot of things just clicking in place," he told reporters in the Capitol yesterday. "The question is whether or not they will follow the ordinary course. If they're determined to get through this, whatever, we saw with Kavanaugh that they'll just do it."

"Durbin also noted that a quick push for a vote may deprive many senators of the customary individual meeting with the nominee.

"There are things in here that they're clearly just going to sweep aside," he said. "They're hellbent on getting this done as fast as possible. They think it helps Donald Trump get reelected."

#### Climate questions

"Democrats have already signaled they will make health care a top focus of the confirmation fight, with a challenge to the Affordable Care Act already on the high court's docket. However, Democrats have also emphasized the climate risks of seating a sixth conservative justice in recent days.

"There's a lot at stake with health care, but remember, there are lots of other rights at stake," Minority Leader Chuck Schumer (D-NY) said yesterday on a conference call with reporters.

"Of course the court has undone so many strong climate regulations, and with a new conservative judge, they could challenge the ability of the EPA to even regulate existing greenhouse gas," Schumer said.

"The youth climate activist group Sunrise Movement is planning a 7 a.m. protest this morning at McConnell's Capitol Hill home with live music.

"The group, which held similar protests earlier this week at the homes of GOP Sens. Lindsey Graham of South Carolina and Thom Tillis of North Carolina, is aiming to use Ginsburg's death to galvanize young voters in swing states before the election."

## **Other**

### [Supreme Court: How the Loss of Ginsburg Will Affect the Term Ahead](#)

On September 21, Pamela King of [Greenwire](#) submitted, "The absence of the late Justice Ruth Bader Ginsburg on the Supreme Court this coming term is unlikely to change the outcome of two looming battles over water rights and Endangered Species Act records, but legal experts say her death will have a lasting impact on environmental jurisprudence at the nation's highest bench.

"As President Trump embarks on a speedy quest to confirm a replacement for Ginsburg, who died Friday at age 87 from complications related to pancreatic cancer, the court will begin holding telephone arguments in two weeks with only eight justices present. Three of those justices are largely sympathetic to environmental interests, and five are generally more skeptical.

"The empty seat on the court could limit environmental cases that the court takes up in the short term and, if a conservative justice is installed on the court, shift the outcome of some high-profile cases in the near future.

"So far, the Supreme Court has just two environmental cases on its docket for this term — a dispute between Texas and New Mexico over stored floodwaters in the Pecos River and a fight between the Sierra Club and the federal government over records related to an EPA rule. Ginsburg wasn't expected to play a consequential role in the outcome of either of those cases.

"But if Trump wins a second term, legal experts largely expect heated high court brawls over the administration's new rules governing implementation of the National Environmental Policy Act, carbon dioxide emissions from power plants and pollution in federally protected waters.

"The chances of rulings in favor of environmental groups — or even recognition of their standing in litigation — could soon get a whole lot slimmer, said Robert Percival,



director of the Environmental Law Program at the University of Maryland's Carey School of Law.

"If a sixth conservative Justice is confirmed before Trump leaves office, Chief Justice John Roberts no longer will be the swing vote," he said, "and the other five conservatives would be free to embrace more extreme interpretations of the environmental laws."

"Roberts led the court to middle ground in several key environmental cases last term, including *County of Maui v. Hawaii Wildlife Fund*, a 6-3 ruling that established a new test for regulating groundwater that carries pollution to federally protected waters.

"With eight justices, the chance of a 4-4 deadlock increases.

"When the Supreme Court can't resolve a stalemate among its members, the ruling of the lower court stands. Those benches are now filled with 53 Trump appointees, bringing the total number of judges he has selected to more than 200.

"Trump has pledged to act swiftly to replace Ginsburg with a conservative justice.

"If he is successful, he will have appointed three of the court's members, including Justice Neil Gorsuch, whom Trump selected after Senate Republicans blocked President Obama's pick of U.S. Court of Appeals for the District of Columbia Circuit Judge Merrick Garland as a replacement for the late conservative Justice Antonin Scalia.

"Until then, the court will operate with only eight justices, likely reducing the number of environmental cases — or any cases, for that matter — that the bench will hear this term, said Jonathan Adler, a law professor at Case Western Reserve University.

"It takes the votes of four justices to accept a petition, and the court grants only about 1% of the cases it receives each term.

"Generally," he said, "when the court is short-handed, the justices are more careful about not accepting cases they don't need to take."

"A win by Democratic presidential nominee Joe Biden in November would likely send federal agencies back to the drawing board on Trump-era environmental rollbacks — which would also prompt fresh rounds of litigation and potential blockades by a more deeply conservative court.

"Environmental groups and the blue states that often join them in lawsuits against the Trump administration's rules say they are already girding for years of prolonged battles — no matter who is on the Supreme Court and in the White House next year.

"We're going to have our work cut out for us to try to undo the damage," Oregon Attorney General Ellen Rosenblum said of the fight against Trump's environmental rollbacks.

"With the loss of Ginsburg, green groups will also lack an advocate for their standing to bring lawsuits in the first place, which the justice addressed in the 2000 case *Friends of the Earth Inc. v. Laidlaw Environmental Services Inc.* "The *Laidlaw* opinion is emblematic of Justice Ginsburg's fervent insistence that the 'little guy' deserves a day in court — deserves at least to be heard," said Cale Jaffe, director of the University of Virginia School of Law's Environmental Law and Community Engagement Clinic.

Cases on the calendar

*Texas v. New Mexico*

"On the first day of its term, the Supreme Court will dive into a battle between Texas and New Mexico over each state's share of water from the Pecos River after a 2014 storm.

"About a year after Tropical Storm Odile inundated the waterway, the Bureau of Reclamation released floodwaters from a New Mexico dam downstream into Texas.

"The problem? The two states are subject to a 1948 compact that ensures the Lone Star State receives its fair share of flows from the river. The special master who oversees the states' water-sharing agreement determined that the floodwater release should be counted toward Texas' apportionment.

"Texas disputed the finding, and the Supreme Court agreed to get involved — despite objections from the Justice Department.

"The case is one of several interstate water wars pending before the high court, including a dispute between Florida and Georgia overflows in the Apalachicola-Chattahoochee-Flint River Basin.

"Legal experts anticipate many more similar cases will come to the court as climate change intensifies drought and ramps up demand for increasingly limited water supplies.

"Oral arguments are scheduled for Oct. 5.

*Fish and Wildlife Service v. Sierra Club*

"Environmental groups and industry interests have aligned in a high court battle over the government's duty to publicize records related to decision-making on environmental and other rules.

“The justices will examine whether the 9th U.S. Circuit Court of Appeals correctly barred the government from invoking a Freedom of Information Act exemption to protect a draft finding that a proposed EPA rule for cooling water intake structures at power plants would harm vulnerable species.

“Fish and Wildlife Service and NOAA Fisheries officials later issued a "no jeopardy" biological opinion for the final rule, which EPA released in 2014.

“Sierra Club has called for access to the draft document, but federal officials have said it is subject to FOIA Exemption 5, which shields pre-decisional records. Groups like the American Farm Bureau Federation and American Forest Resource Council that often face off against the Sierra Club in court have joined the environmentalists' call for greater transparency.

Arguments will take place on Nov. 2.

Petitions to watch

*Massachusetts Lobstermen's Association v. Ross*

“A yearslong battle over the first marine monument in the Atlantic Ocean may make its way to the justices this term.

“Commercial fishing groups are calling on the Supreme Court to find that the Obama administration exceeded its authority when it designated the Northeast Canyons and Seamounts Marine National Monument in 2016. They filed their petition after President “Trump unwound fishing restrictions in the sanctuary, a proclamation the challengers say could be reversed by a future administration.

“Environmental groups are advocating for the monument's continued protection.

*Trump v. Sierra Club and El Paso County v. Trump*

“The Supreme Court could choose to take up the government's battle to use \$2.5 billion in military funds to build border walls between the United States and Mexico.

“Lower court have twice struck down the Trump administration's attempt to transfer the Defense Department funds after Congress appropriated just \$1.375 billion for the project. Green groups, states and community advocates have led the charge against the scheme in court.

“The solicitor general's office is making the case that not only was the funding transfer permissible, but environmental challengers in the case did not have standing to bring the lawsuit in the first place.

“In a companion petition, a Texas county and community groups have argued that the justices should take up their challenge to the border wall project if the court decides to grant the government's plea.

“The Supreme Court has gotten involved in preliminary stages of the border wall litigation but has not yet weighed in on the merits of the case.

*United States v. Kane County, Utah, and Kane County v. United States*

“Environmental groups' standing is again in the crosshairs in a fight over public roads that cross federal lands in Utah.

“The solicitor general's office has asked the Supreme Court to find that the Southern Utah Wilderness Alliance and the Wilderness Society should not be able to intervene in negotiations between federal and state officials over ownership of a large network of roads, cow paths and two-track paths across the Beehive State.

“State and local officials in Utah have filed a companion petition that also takes aim at the green groups' involvement in the case.

*Montana and Wyoming v. Washington*

“The court will soon decide whether it will hear a challenge by coal-producing states over Washington state's decision to block a water permit for the coal export project Millennium Bulk Terminals.

“Wyoming and Montana argue that the decision to bring the project to a halt violated protections for interstate commerce enshrined in the Constitution.

*PennEast Pipeline Co. LLC v. New Jersey*

“Developers of the PennEast natural gas pipeline are asking the high court to overturn a ruling by the 3rd U.S. Circuit Court of Appeals that blocked construction of the 116-mile project on state land in New Jersey.

“The 3rd Circuit found that PennEast Pipeline Co. LLC had violated the Garden State's sovereign immunity protected under the 11th Amendment to the Constitution when it sought to condemn state-controlled land in the pipeline's path.

“In June, the justices invited the solicitor general to weigh in on the case, but the Trump administration has not yet filed its response with the court.

*BP PLC v. Mayor and City Council of Baltimore*

“The justices are currently weighing whether to pick up a petition in Baltimore's climate case against energy companies, which was sent back to state court in 2019. Energy

companies have asked the high court to weigh in on whether the case should be heard at a state or federal bench.

“Federal judges have largely decided the cases belong in local venues, but energy industry attorneys have kept the disputes alive by citing technical rules governing federal officer involvement in oil and gas extraction.

“Prior efforts by industry to engage the Supreme Court on the issue of climate damages against oil majors have failed, though companies have promised there are more petitions to come.”

*Reporters Niina H. Farah and Jennifer Hijazi contributed.*