

# Developments in Federal Energy and Climate Change Policy

**Craig Gannett**

LSI Seventh Annual Comprehensive Conference on  
Energy in Alaska  
Anchorage, AK  
December 2, 2011



Davis Wright  
Tremain LLP

DEFINING SUCCESS TOGETHER

# Agenda

- Review of 2005-2010
- Congressional Outlook
  - Cap and Trade
  - Energy Legislation
  - Energy Tax Legislation
  - Concerns Re EPA Regulations
- Other Climate-Related Matters
  - California Cap and Trade
  - NEPA
  - SEC Disclosure

# 2005-2010: Energy and Climate Are Center Stage

- 2005: Congress increases solar ITC from 10% to 30% and creates Section 1703 Loan Guarantee Program
- 2005: EU cap & trade program begins
- 2007: Supreme Court decides Mass. v. EPA
- 2008: Obama elected plus Democratic Congress

# 2005-2010 (cont.)

- 2009: Recovery Act
  - PTC projects may claim ITC
  - Extended place-in-service deadlines for PTC and ITC
  - Treasury grants in lieu of tax credits (Section 1603)
  - New tax incentives for manufacturing of renewable energy technology in the U.S. (e.g. solar panels, wind turbines) (Section 48C)
  - Section 1705 DOE Loan Guarantee Program
- 2009: Waxman-Markey passes the House; Cap & Trade and RPS appear within reach
- Courts entertaining idea of nuisance liability for GHGs

# Congress Outlook



# Congressional Outlook (cont.)

- Cap and trade
- Near-term focus on avoiding shutdown
- Energy
- Energy tax
- EPA regulations and reliability

# Energy Legislation

- Hydro licensing reform (S. 629)
  - Speed licensing process
  - Increases exemption from 5 MW to 10 MW
  - Encourages adding turbines to existing dams and conduits (3% of 80,000 dams)
- Clean Energy Standard
  - Includes natural gas & nuclear
- Natural gas development incentives
  - Increased gas pipeline loan guarantees

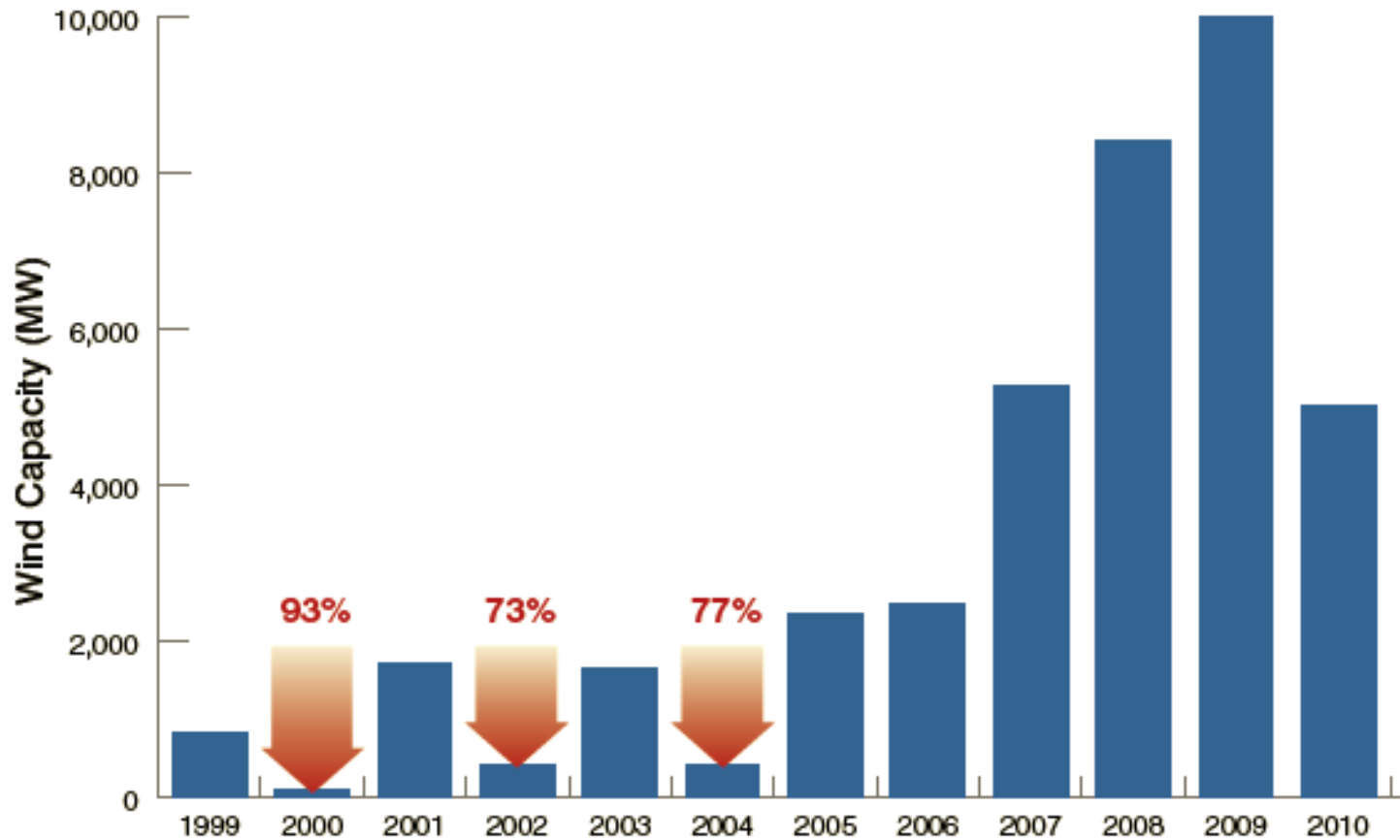
# Energy Tax Legislation

- **Wind:**

- PTC of 2.17 cents per/kw expires for projects not placed in service by end of 2012
- Can elect to receive a 30% ITC instead of the PTC
- Can elect to receive 30% cash grant (for projects placed in service by end of 2012, where construction began before the end of 2011)
- All of the above expires for projects not placed in service by 12/31/12
- Wind industry is pressing for an extension of at least 4 years

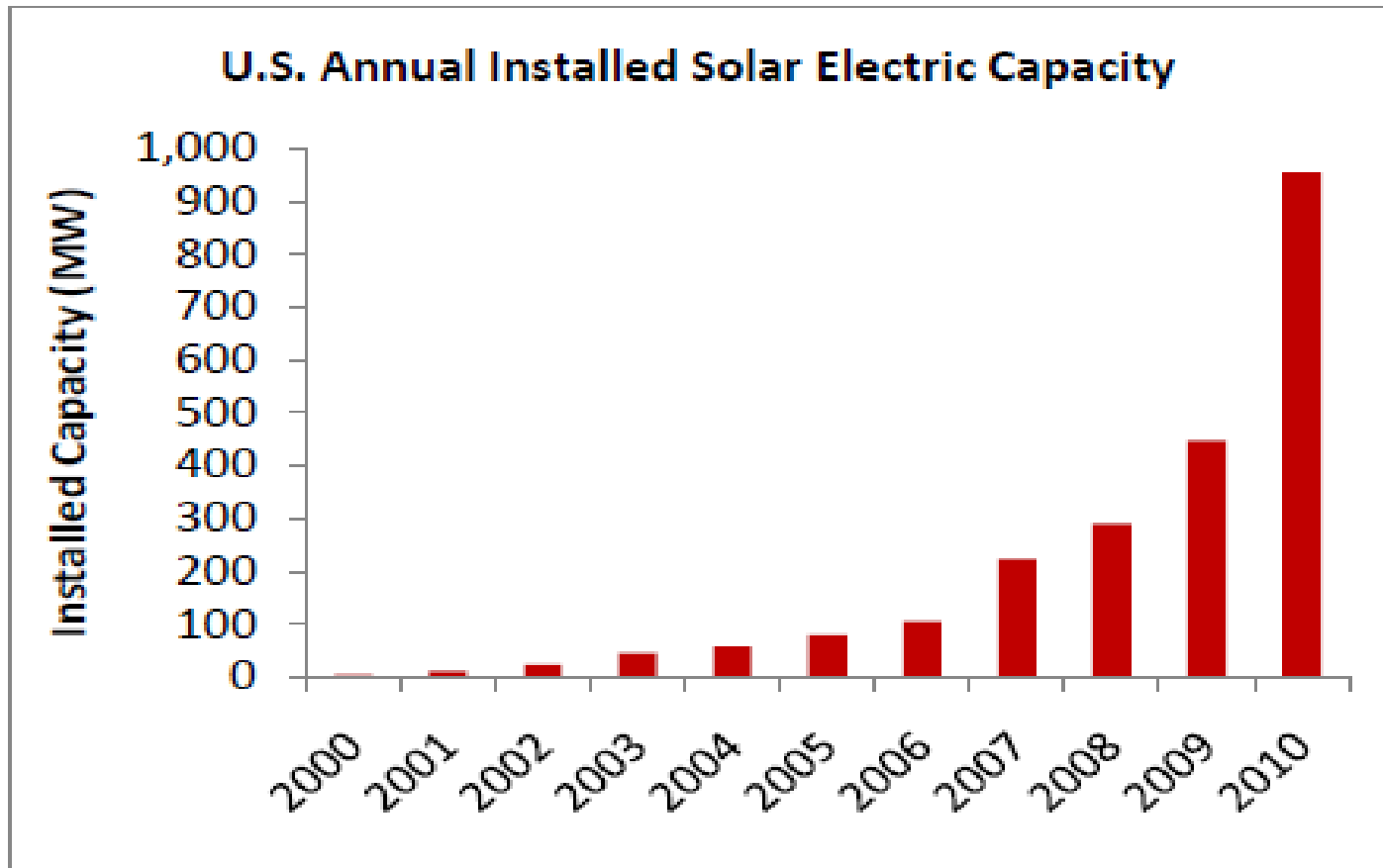


# Unpredictable PTC Extensions Stymie Investment



# Energy Tax (cont.)

- **Solar:**
  - No PTC
  - 30% ITC expires at the end of 2016; thereafter 10%
  - Can elect to receive 30% cash grant (for projects placed in service by end of 2016, where construction began before the end of 2011)
  - Solar industry seeking extension of 2011 deadline



Source: SEIA

# Arguments in Favor of Extending Tax Incentives for Renewables

- Small, perhaps even positive, net impact on the Treasury (says GE)
- Renewable energy tax expenditures only recently eclipsed fossil fuel tax expenditures
- Jobs, jobs, jobs

# Obstacles to Extending Tax Incentives

- Republicans control House, and may take Senate next year
- Two leading debt reduction proposals would cut PTC, ITC, grants, and loans
- Budget Control Act of 2011
  - Super-Committee trainwreck
  - Automatic sequestration

# Congressional Concerns re EPA Clean Air Act Regulations

- House Republicans supporting legislation to:
  - Prohibit EPA regulation of GHG for one year
  - Reduce EPA funding by 18%
- Reliability concerns
- Democratic Senate and Obama will play defense through the end of next year, but then?

# California Cap and Trade

- Effective next month (1/1/12)
- Reduce GHG emissions to 1990 levels by 2020
- Possible model for WCI, RGGI, and Midwest Accord

# NEPA Overview

- NEPA requires assessment of environmental impacts of “major Federal actions significantly affecting the quality of the human environment”
- Administered by White House Council on Environmental Quality (CEQ)
- CEQ has issued draft guidance on analyzing climate change-related impacts under NEPA



# NEPA Overview (cont.)

- NEPA analysis requires a detailed statement:
  - environmental impacts
  - adverse environmental effects that cannot be avoided
  - alternatives
  - relationship between short-term uses and long-term productivity, and
  - any irreversible and irretrievable commitments of resources

# NEPA Meets Climate Change

- CEQ now saying that climate change must be part of NEPA analysis, like any other environmental impact:
  - Effect of the proposed project on GHG emissions; and
  - Effect of climate change on the proposed project

# Project Impact on Climate Change

- Recommended threshold for analysis is 25,000 metric tons annually
- At or above that level, CEQ recommends that agencies:
  - Quantify cumulative emissions over project life
  - Discuss measures to reduce GHG emissions, including reasonable alternatives, and
  - Qualitatively discuss the link between such GHG emissions and climate change

# Climate Change Impacts on Project

- Level of analysis depends on:
  - Vulnerability of the project
  - Vulnerability of the affected environment
  - Project timeframe
- No new research needed; may rely on existing scientific literature
- CEQ example: an industrial facility that draws water from a water body that is dwindling because of decreased snowpack in the mountains or that is warming due to increasing atmospheric temperatures

# SEC Guidance

- Guidance Regarding Disclosure Related to Climate Change, 17 C.F.R. parts 211, 231 and 241
- Required disclosures include:
  - Impact of future climate regulation
  - Effect of water supply changes, rising sea levels, changing weather patterns, etc. on the company and its supply chain
  - Effect of climate change on demand for the company's products or services

# Summary

- Cap and Trade dead, but watch CA
- Potential for energy legislation
- Potential for energy tax legislation
- Be prepared to analyze climate in NEPA
- Be prepared for increased disclosure

# For More Information:

**Craig Gannett**

Co-chair, Energy Practice Group

Co-chair, Climate Change Practice  
Group

206.757.8048

[craiggannett@dwt.com](mailto:craiggannett@dwt.com)

