



# POLICY OUTLOOK FOR 2015

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At the beginning of each year, Van Ness Feldman professionals provide their policy outlook for the coming year in the major areas of our practice: energy, the environment, natural resources, land use, and government relations. This year's Policy Outlook focuses on likely 2015 developments in Congress and the Executive Branch. We hope that you find this document to be helpful and encourage you to contact one of our professionals if you are interested in additional information on any issue covered in the Policy Outlook.

## OVERVIEW OF 2015

Following the large number of Republican victories in last November's election, there are several factors to consider in evaluating public policy opportunities and challenges in Washington this year.

The first is Republican majority control of both the House and Senate; thus enabling Republicans to act on their policy priorities as well as use the instruments of the Legislative Branch to challenge the Obama Administration. The second is President Obama will continue to use executive actions to achieve his policy objectives in his final two years in office.

The most noteworthy change on Capitol Hill in 2015 is in the Senate where Senator Mitch McConnell (R-KY) has replaced Senator Harry Reid (D-NV) as Majority Leader. In a floor statement in early January, Majority Leader McConnell set forth his plans for the operation of the United States Senate: "We need to get committees working again. We need to recommit to a rational, functioning appropriations process. We need to open up . . . the legislative process in a way that allows more amendments from both sides."

Under Senate "regular order", new committee and subcommittee chairs will greatly impact the legislative agenda in the Senate. For example, Senator Lisa Murkowski (R-AK) will exert great influence over energy, environment and natural resource issues as Chairman of both the Senate Committee on Energy and Natural Resources and the Interior Appropriations Subcommittee.

Republicans secured the Senate Majority with the election of 9 new Senators. Several have been assigned key committee assignments important to energy, environment and natural resources issues including Senators Dan Sullivan (AK), Shelley Moore Capito (WV), Bill Cassidy (LA), James Lankford (OK), Cory Gardner (CO), Steve Daines (MT), and Mike Rounds (SD). This is an experienced group of policymakers who will have an immediate impact in their new roles. New Committee assignments in both the House and Senate can be viewed in this [VNE Alert](#).

The House Republican majority now stands at 247 members, the largest number of Republicans in the House of Representatives since the late 1940s. With limited opportunities for House Democrats to obstruct the House majority, Republican leaders will focus on managing political and policy differences within House Republican ranks, working closely with Senate Republicans, and challenging the Obama Administration's executive actions on issues ranging from climate change to health care to immigration.

President Obama's response to gridlock in prior sessions of Congress has been to use executive actions to advance his policy initiatives. This is particularly true on environmental and climate change matters where the Administration continues to push forward a series of controversial rulemakings at the Environmental Protection Agency (EPA). We expect the President will continue to use executive actions to advance Administration priorities.

The President has signaled a desire to work with Congressional Republicans to adopt bipartisan legislation in some substantive areas. However, the President has also set an ambitious agenda for his final two years that includes issues that are not likely to be considered by Republicans in Congress. The President has vowed to veto legislative attempts to rollback his environmental, climate change, health care and immigration initiatives. Presidential vetoes are likely to stand as Republicans lack the votes in either chamber to override a veto.

We see Washington's policy leaders emboldened to act on their respective agendas. Republicans in Congress are intent on returning the Legislative Branch to "regular order" so as to capitalize on their majority status, contest policy differences with the Obama Administration, and build political support necessary to maintain control of the Congress. The President is equally intent on defending actions of the Administration on climate change, health care and immigration, to frame his political legacy, and to seek collaboration with Capitol Hill where possible.

Sequestration or mandatory and automatic budget cuts agreed to by the Congress and the President in the Budget Control Act of 2011 resumes in fiscal year 2016 unless the law is changed by October 1, 2015. This budget dynamic will impact budget talks between the Administration and the Congress and the fiscal priorities of both political parties. President Obama has requested Congress lift sequestration for both domestic and national security spending in the Administration's fiscal year 2016 budget. Key Republican Congressional leaders have expressed an interest in exempting national security spending from sequestration's mandatory budget cuts.

And not to be overlooked, the 2016 election cycle has already begun. President Obama will conclude his term in less than two years and new aspirants are exploring campaigns for the Presidency. Republicans are preparing to defend a large number of seats in the 2016 election with Democrats intent on regaining control of the Senate. The 2016 elections will impact policy and political considerations throughout 2015 on Capitol Hill and across the Executive Branch.

A list of the Outlook's topics is set forth below:

- [Climate Change](#)
- [Waters of the United States](#)
- [Keystone Pipeline](#)
- [Energy Exports](#)
- [Crude by Rail](#)
- [Revenue Sharing](#)
- [Nuclear Issues](#)
- [Comprehensive Energy Legislation](#)
- [Appropriations](#)
- [Congressional Oversight](#)
- [Budget Reconciliation](#)
- [Biofuels](#)
- [Coal](#)
- [Columbia River Treaty](#)
- [Commodity Futures Trading Commission \(CFTC\) Regulation](#)
- [Crude Oil Market Implications](#)
- [Cybersecurity](#)
- [Department of Defense \(DOD\) Renewable Energy Initiatives](#)
- [Electricity Regulation](#)
- [Endangered Species Act \(ESA\)](#)
- [Energy Efficiency](#)
- [EPA Motor Vehicle Regulation](#)

- [Federal Funding](#)
- [Flood Insurance](#)
- [Government Spending/Debt Status](#)
- [Healthcare](#)
- [Hydropower](#)
- [National Environmental Policy Act](#)
- [Oil and Gas Infrastructure](#)
- [Ozone Standards](#)
- [Pipeline Safety](#)
- [Reliability](#)
- [Renewable Energy](#)
- [Tax Reform/Tax Extenders](#)
- [Transportation and Infrastructure](#)
- [Tribal Economic Development](#)

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## CLIMATE CHANGE

***The Obama Administration has a busy climate policy agenda for 2015, which is sure to be met by strong opposition from the Republican Congress.*** In late summer, the Administration will seek to finalize three proposed rules that collectively would establish greenhouse gas emission standards for the nation's new, modified and reconstructed, and existing power plants. EPA's finalization of these rules will trigger a rush to the courthouse as various interests file challenges or interventions of support. In connection with finalizing its rule for existing power plants (termed the "Clean Power Plan"), EPA also is scheduled to issue, this summer, a proposed "federal implementation plan" (FIP) that will apply to any state that fails to submit a timely and satisfactory state compliance plan. EPA's proposed FIP could help shape states' development of compliance plans, and may discourage the growing number of state policymakers considering not submitting state plans. For more information, see our [VNF Alert](#) on the forthcoming FIP.

The White House also has outlined a blueprint for new regulatory and non-regulatory policies to address methane emissions by the oil and gas sector. The blueprint calls for EPA to issue a proposed rule in the summer that will regulate methane emissions from new and modified sources in the sector; new rules from the Bureau of Land Management (BLM) (addressing venting and flaring from production on public lands) and the Pipeline and Hazardous Materials Safety Administration (PHMSA); and a substantial expansion of voluntary industry programs. The blueprint provides little detail on the voluntary programs, however, which implies a substantial role for industry to negotiate levels and types of reductions, verification, and other matters. For more information, see our [VNF review](#) of the methane policy blueprint.

Climate policy also will figure in other Administrative initiatives. For example, the Council on Environmental Quality (CEQ) has issued new guidance on consideration of climate impacts in environmental reviews under the National Environmental Policy Act (NEPA), which could provide a new lever of pressure on major energy infrastructure projects. In addition, the EPA will continue to move forward on its greenhouse gas (GHG) regulations for new motor vehicles (see our discussion of [EPA Motor Vehicle regulation](#)). The Administration plans to bring its raft of domestic climate initiatives into the major international climate talks scheduled to occur at the end of the year in Paris, which are focused on reaching a new international agreement that will apply starting in 2020.

The Republican Congressional Majority has committed to address what it views as EPA overreach, with a particular focus on these Administration initiatives. Republican leadership has taken strong positions against all

varieties of greenhouse gas regulation and has expressed opposition to new funding associated with the international climate negotiations. Accordingly, expect Congressional committees with jurisdiction over environment, energy, and natural resource issues to hold a number of oversight hearings. In addition, Majority Leader McConnell already has made clear that he will be introducing Congressional Review Act resolutions to invalidate major greenhouse gas regulations once they are finalized (see our discussion of Congressional Oversight), and GOP members likely will seek to use the appropriations process to de-fund Administration greenhouse gas regulatory initiatives. The Democratic minority will attempt to block these attempted roll-backs and, in the process, will continue to attempt to put Republican members on the record on the science of climate change and the need for policy responses. President Obama is expected to veto Congressional efforts to limit the Administration's response to climate.

## WATERS OF THE UNITED STATES

***A final rule on the definition of "Waters of the United States" could be issued and Congressional opposition to the rule will continue.*** In March 2014, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) announced a proposed rulemaking on a new and very broad definition of "Waters of the United States." The proposed rule has important regulatory implications because permitting requirements under Clean Water Act (CWA) Section 402 (point source discharges) and Section 404 (dredge and fill activities) are triggered for activities within or affecting "Waters of the United States." Critics of the proposed rule have asserted that the new definition would result in a significant expansion of the number and scope of waters and activities subject to CWA regulation under both Sections 402 and 404. Due to concerns about the potential expansion of jurisdictional scope and a lack of clarity in accompanying interpretive guidance, the proposed rule met with widespread criticism from the public and within Congress.

The debate as to the appropriate interpretation of "Waters of the United States" will continue in 2015. EPA and the USACE officials have publicly stated a goal of completing a final rule by April 2015. At the same time, Congressional critics have already begun efforts to oppose any final rule. In early February, House members reintroduced a measure the House approved last year that would require withdrawal of the proposed rule and further consultation with state and local officials. This bill already has over 100 co-sponsors and the House is likely to pass this legislation in the near future.

Undoubtedly, there will be a number of relevant legislative initiatives, some stand-alone legislation and others offered as amendments to appropriations bills and, perhaps, as provisions in a budget reconciliation bill. Most of these efforts are likely to be the subject of veto threats by the President. While members of both parties have been highly critical of the proposed rule, it is unclear whether there is sufficient support to override a Presidential veto.

Whether successful or not, these legislative initiatives are likely to inform the EPA and the USACE as they consider changes to a final rule and accompanying interpretative guidance. Moreover, issuance of a final rule undoubtedly will raise a further round of Congressional debate and inquiry as to the nature of any changes made between the proposed and final rule and also trigger new legislation and related efforts focusing on implementation of the final rule.

## KEYSTONE PIPELINE

***The Keystone saga moves into its seventh year; despite Congressional efforts to force approval, the outcome remains unclear.*** As of February 2015, TransCanada, which has filed two applications for the Presidential permit that is required for the pipeline, is still waiting for the issuance of a required determination by the State Department as to whether the pipeline would be in the "national interest." President Obama has made clear that it is up to the State Department to make an initial determination, but that he will ultimately only issue a permit if the net effects of the pipeline will "not significantly exacerbate" climate change. Approximately one year ago, the State department issued its long-awaited final supplemental environmental impact statement

(FSEIS), which found that the Canadian oil sands would be developed with or without the pipeline and so the pipeline itself would not significantly contribute to climate change. The State Department solicited comments from other agencies, due by February 2015, but these largely have not been released publicly. A public letter from EPA, while less critical than agency comments on previous EIS drafts, highlighted the significant drop in oil prices since the FSEIS was released and asked State to reevaluate its overall conclusions on the climate impacts of the pipeline. With the completion of the FSEIS, the submission of agency comments, and the January 9, 2015 resolution by the Nebraska Supreme Court of a lawsuit regarding the pipeline's route, all identified hurdles have been cleared for Secretary of State John Kerry to make the national interest determination and recommendation to President Obama regarding whether to approve Keystone XL's Presidential Permit application.

Meanwhile, the new Republican controlled Congress is attempting to approve the pipeline through legislation. In early January 2015, the House passed a bill to authorize the Keystone XL pipeline without the need for a Presidential Permit. The Senate debated and passed a similar bill in late January, but not without addressing numerous amendments on climate change and other issues. The House passed the Senate approved bill in early February. President Obama has already indicated that he will veto the bill – on separation of powers grounds – in order to allow the State Department to complete its review. Congress almost certainly does not have the votes to override a presidential veto. The ultimate fate of Keystone XL depends on President Obama and whether he determines the pipeline is in the national interest. There is currently no timeline for such a determination, but the determination could occur in 2015.

## ENERGY EXPORTS

***Despite the current drop in oil prices, we expect to see a building debate in 2015 over whether or not the current ban on crude oil exports should be repealed.*** Even with the crude oil export ban firmly in place, 2014 marked a record year for United States crude oil exports. In November 2014, U.S. exports of crude were the highest ever recorded, exceeding half a million barrels per day.

In the House, Rep. Joe Barton (R-TX) has again introduced legislation to repeal the 40 year old ban on crude oil exports. In the Senate, the new Chairman of the Senate Energy and Natural Resources Committee, Senator Lisa Murkowski (R-AK) remains an advocate for repealing the ban on crude oil exports. During Senate consideration of the Keystone XL pipeline legislation in January, Senator Ted Cruz (R-TX) introduced an amendment to repeal the crude oil export ban. Perhaps because many in the crude oil industry believed that a vote on the issue was premature, Senator Cruz did not seek a vote on his amendment. Within industry, there remain divisions of opinion regarding the crude oil ban, with most producers supporting the repeal, some refiners opposing the repeal, and some industry participants ambivalent.

The Department of Commerce's Bureau of Industry and Security's (BIS) recently clarified that lease condensate that has passed through a crude oil distillation tower and has been materially processed constitutes a refined petroleum product, will not be considered to be crude oil, and so are not subject to the ban on crude oil exports. As such, even if Congress does not repeal the crude oil export ban, there are expected to be an increased number of companies in 2015 seeking to export lease condensates. Many of these exports likely will be undertaken without a prior commodity classification decision from the BIS.

With respect to LNG exports, the Sabine Pass liquefaction facility likely will come online this year with an export capacity of 2.6 Bcf/d. Although the Department of Energy has also approved exports from Cameron and Cove Point LNG facilities, these facilities are not likely to come online in 2015. In early January, Sens. John Barrasso (R-WY) and Martin Heinrich (D-NM) introduced legislation to accelerate the LNG export approval process by reducing permitting delays. On January 28, the Senate Energy and Natural Resources Committee conducted a hearing on the bill. The House has already passed a similar bill and further action is expected in the Senate in the near future.

## CRUDE BY RAIL

***Watch for new federal regulations on tank car standards and rail operational controls; rail service issues will be a Congressional priority.*** Despite the recent drop in oil prices, North American crude production remains high. Production has increased dramatically over the past decade and so has the number of crude-by-rail shipments. Companies are increasingly dependent on rail to transport energy products because some proposed pipeline projects face permitting hurdles, water transportation is of limited availability, and motor carriage has limited utility for crude shipments over long distances. Federal safety regulation and Congressional involvement in rail service issues are likely to be at the forefront in 2015.

In the wake of several high-profile accidents involving oil trains, including most recently in West Virginia, the Pipeline and Hazardous Materials Safety Administration of the U.S. Department of Transportation (DOT), in coordination with the Federal Railroad Administration, is expected to promulgate stricter tank car standards and operational controls for trains carrying flammable liquids. DOT issued a Notice of Proposed Rulemaking in August 2014 and anticipates releasing a final rule in May 2015, with a goal of reducing the frequency and consequences of train accidents. The rule is expected to include design specifications for a new tank car standard, the DOT-117, and impose a timeline for retrofit or phase-out of legacy DOT-111 cars, among other matters. DOT is coordinating with Transport Canada in an effort to harmonize tank car standards. The DOT rules also are likely to include speed restrictions, braking requirements, rail routing requirements, and emergency response notification requirements for certain trains. Over 3,500 public comments were filed, reflecting a wide range of views. Environmental groups argue that the rules do not go far enough; some shippers/offerors assert that the root cause of derailments is faulty track, inadequate track maintenance, or train operation, not tank car design.

Congressional concerns have been focused more recently on rail service problems, which largely fall within the purview of the Surface Transportation Board (STB). Although rail service has improved somewhat over the past couple of months compared to 2014, many areas of the country continue to suffer major delays, affecting the agricultural, industrial, mining, and electricity sectors, among others. Many are quick to point to the surge in crude-by-rail shipments as the cause of service problems, but railroads are common carriers with a legal obligation to carry all shipments tendered in conformance with applicable regulations. Therefore, it is not possible to identify a single commodity as the sole or even primary cause of ongoing rail-service problems. Railroads need to expand capacity and achieve operational efficiencies in order to improve service for shippers of all commodities. The Senate may consider STB reauthorization legislation that could have an impact on rail service and rail-capacity increases.

## REVENUE SHARING

***Senator Lisa Murkowski (R-AK), Chairman of the Senate Energy and Natural Resources Committee, has indicated that revenue sharing for coastal producing states is one of her priorities for this Congress.*** States with federal offshore oil and gas production off their coasts have long sought a share of these federal revenues. These states make the case that their states provide a wide range of uncompensated government services to support this federal activity. During the Senate consideration of Keystone XL pipeline legislation last month, Senators David Vitter (R-LA) and Bill Cassidy (R-LA) offered a revenue sharing amendment to the Keystone legislation, but did not take the issue to a vote. Ironically, the President's Budget for FY2016 proposes to reallocate money from the only currently enacted revenue sharing legislation, the Gulf of Mexico Energy Security Act (GOMESA) of 2006. Phase 1 of GOMESA provides for modest sharing of revenues with Alabama, Mississippi, Louisiana, and Texas from a limited number of federal offshore oil and gas leases in the Eastern Gulf of Mexico. Phase 2 of GOMESA, which provides for the annual distribution of \$500 million to the same four states from additional leases in the Central Gulf of Mexico, was deferred for a decade due to budget act constraints, but the sharing of these revenues is scheduled to commence in calendar year 2016.



Coastal states make the case that these government services are comparable to the uncompensated services provided by states with federal mineral production on federal lands within their states. Under the Mineral Lands Leasing Act, states receive 50% of the federal revenues from mineral development on lands within the states. Except from GOMESA, coastal states receive no share of federal offshore oil and gas revenues.

We believe offshore revenue sharing will be considered as part of a larger package of policy provisions. One vehicle for offshore revenue sharing could be the comprehensive energy legislation that Senator Murkowski (R-AK) is preparing for consideration later this year. A second possible vehicle for consideration of offshore revenue sharing is legislation like the Conservation and Reinvestment Act (CARA) that passed the House of Representatives in 2000 by a vote of 315 to 107. Similar legislation was reported by the Senate Energy and Natural Resources Committee in 2000. That year, sixty-three Senators wrote to the Senate Majority Leader unsuccessfully requesting that the legislation be scheduled for a vote. In CARA, only part of the funds allocated among the states was for offshore revenue sharing, with the remainder being allocated to all the states for a variety of conservation purposes. In this legislation, revenue sharing would be presented as a conservation initiative.

## NUCLEAR ISSUES

***Congress will focus on nuclear waste implementation issues and litigation will affect whether nuclear licensing decisions continue.*** Congress will consider significant changes in nuclear waste-related statutes that were recommended in the 2012 Final Report of the Blue Ribbon Commission (BRC) on America's Nuclear Future. The BRC's recommendations included creating a new entity to manage nuclear-waste issues for the federal government and adopting consent-based siting for storage facilities and repositories. Additionally, Congress will consider appropriations for the Yucca Mountain Project Nuclear Regulatory Commission (NRC) licensing proceeding and for pilot and interim nuclear waste storage facilities. Senate Energy Committee Chairman Murkowski has told the press that she intends to address nuclear waste issues in a comprehensive energy bill, and there are reports of discussions between key Members of the House and the Senate on nuclear waste issues. In the past, the House has insisted on proceeding with the licensing process for the Yucca Mountain Project, while the Senate has declined to consider nuclear waste issues if that would provide funding for the Yucca Mountain Project.

Meanwhile, litigation at the NRC and U.S. Court of Appeals for the D.C. Circuit will determine whether nuclear licensing stalls. The NRC's "Continued Storage Rule," which is necessary to allow the issuance of licenses for new reactors and extensions of licenses for existing reactors, is being challenged by the Natural Resources Defense Council (NRDC) and others in the D. C. Circuit. Environmental groups including NRDC have petitioned the NRC to suspend the Rule (and thus suspend licensing proceedings) until the D.C. Circuit litigation is resolved; the NRC is expected to rule on the suspension request soon. If the NRC declines the suspension request so that it may continue to issue reactor licenses, the environmental groups likely will request that the D.C. Circuit stay the Continued Storage Rule so as to prevent issuance of reactor licenses until the litigation is resolved.

## COMPREHENSIVE ENERGY LEGISLATION

***Both House and Senate Committee leaders have stated that they intend to work towards crafting a comprehensive energy bill in the 114<sup>th</sup> Congress.*** Congressional leaders have made many attempts to craft and pass comprehensive energy legislation in every Congress since the 1973 oil embargo, and it will be a topic of focus again in 2015 and 2016.

At the Senate Energy and Natural Resources Committee's first hearing in January, Chairman Lisa Murkowski (R-AK) announced she plans to hold hearings in early 2015 on electric grid innovation, nuclear waste policy, LNG exports, Outer Continental Shelf development and revenue sharing, the Administration's Quadrennial Energy Review and critical minerals, as well as a number of oversight hearings. The Chairman also stated that these hearings "will form the basis for a comprehensive energy bill that will address supply, infrastructure, efficiency,

and accountability” for the Committee to consider. Chairman Murkowski is expected to work closely with leaders of the House Energy and Commerce Committee to produce bicameral and bipartisan legislation.

House Energy and Commerce Committee Chairman Fred Upton (R-MI) recently released the second iteration of his “Architecture of Abundance,” a plan to address five issues at the Committee in 2015: transmission, limits on the Obama Administration’s climate rules, manufacturing in energy intensive industries, energy as a “diplomatic tool,” and energy efficiency. Chairman Upton and Energy and Power Subcommittee Chairman Ed Whitfield (R-KY) are preparing a series of discussion drafts on these topics for release in the coming months. The leaders stated that the drafts will create a framework for energy legislation, which the committee intends to move to the House floor later this year.

## APPROPRIATIONS

*The annual Congressional appropriations process to fund federal government operations stands out as a potential point of conflict between Congressional Republicans and President Obama in the 114<sup>th</sup> Congress.* In recent years, House Republicans and Senate Democrats struggled to complete the 12 annual appropriations bills resulting in short-term continuing resolutions or omnibus funding measures. With each party controlling one body of the Congress, the House and Senate were forced to agree to funding compromises and limit policy language in the appropriations bills. This year, in control of the House and Senate, the Republicans likely will use the appropriations bills to challenge the Obama Administration on numerous policy issues.

Congressional Republicans, particularly in the House of Representatives, are planning to use the appropriations process to counter President Obama’s executive actions and rulemaking initiatives. Republicans have signaled they will seek to rollback or limit controversial regulatory initiatives at the Environmental Protection Agency (EPA) including greenhouse gas emission standards, methane emissions by the oil and gas sector, and ozone standards. The EPA’s “Waters of the United States” rulemaking is also likely to be challenged by Congressional Republicans in the appropriations process. Many of the issues raised in this annual policy outlook could be addressed in appropriations bills during 2015.

Already, Republicans are seeking to use the legislation for funding Homeland Security for the balance of Fiscal Year 2015 to overturn the President’s executive action on immigration reform. The President has vowed to veto any such legislation. This initial standoff between the Congress and the Administration may demonstrate the limits of relying on the appropriations process to settle large policy disputes between Congressional Republicans and President Obama.

Appropriations bills have long been used by the Congress to influence the Executive Branch. Perhaps the most common practice is to limit or deny funding for the Administration to carry out a particular activity. As an example, for several years, Congressional Republicans have attached a policy rider to deny funding to the Administration to enforce the 2007 law to phase out sales of the incandescent light bulb. Congress regularly expresses its policy objectives through the appropriations process by increasing or decreasing funding to a particular department, agency, program, or activity.

We expect there will be several high profile confrontations between Congressional Republicans and the Administration as appropriations bills are debated this year. While these high profile confrontations will appeal to partisans and interest groups, they are unlikely to result in major policy changes. Congressional Republicans now have additional leverage in this process. The eventual outcome or compromises with the Administration will demonstrate just how much can be accomplished with this new leverage.

## CONGRESSIONAL OVERSIGHT

*Congressional oversight will play a prominent role in the final two years of the Obama Administration.* Oversight will take place in a number of ways –hearings, confirmation of appointments, correspondence with



the Administration, legislation and through the Congressional Review Act (CRA) of 1996. These oversight efforts will be aimed at limiting Administration initiatives and highlighting Republican priorities.

Last Congress, the House was prolific in the use of oversight hearings on issues ranging from EPA climate rules to the DOE loan guarantee program. We expect vigorous House oversight to continue. House Oversight and Government Reform Committee Chairman Jason Chaffetz (R-UT) has created a new subcommittee focused on energy and environment policy and oversight of the Interior Department, Energy Department, EPA and Agriculture Department. House Natural Resource Committee Chairman Rob Bishop (R-UT) has created an Oversight and Investigations Subcommittee with jurisdiction over land, water, energy and natural resource issues. The Senate is expected to follow suit and there may be joint oversight hearings. For example, the House Transportation and Infrastructure Committee and the Senate Environment and Public Works Committee recently held a joint hearing on the impacts of the proposed "Waters of the U.S." rule.

Under the CRA, Congress may review "major" final rules issued by federal agencies within 60 legislative days before the rules are scheduled to take effect. A "major" rule includes any rule that is expected to have an annual effect on the economy of at least \$100 million. If Congress passes a joint resolution of disapproval of a final rule under the CRA, and the President signs the resolution, the rules have no force or effect and cannot be re-proposed. Senate Majority Leader Mitch McConnell (R-KY) already has announced that the CRA will be invoked against EPA's forthcoming power plant rules regulating GHG emissions (Clean Power Plan). The CRA has only been used successfully once in 43 attempts. President Obama is expected to veto any such joint resolution of disapproval related to Administration executive actions.

## BUDGET RECONCILIATION

*Republicans in the 114th Congress will seek to use the "budget reconciliation" process to circumvent Democratic filibusters in the Senate and move priority legislation to the President's desk.* Congress has used the budget reconciliation process to enact many of the major mandatory spending and revenue laws adopted in the past 40 years. Recent examples of legislation enacted through the reconciliation process include the Affordable Care Act and the 2001 and 2003 individual tax rate reductions proposed by President Bush. For more information on the mechanics of budget reconciliation, see our [recent alert](#) on what budget reconciliation is and why it matters.

We expect Republicans, with control of both houses of Congress, to use the budget reconciliation process to pass policy proposals that Democrats oppose. The President can veto legislation passed through the reconciliation process and a two-thirds vote of each House of Congress is required to override the President's veto. Some of the policies that could be addressed through reconciliation include tax reform, the public debt limit, the Affordable Care Act, Medicare/Medicaid reform, and opening the Arctic National Wildlife Refuge to oil and gas exploration and development.

## ADDITIONAL POLICY ISSUES TO WATCH IN 2015

In addition to the issues highlighted above, the following additional issues also merit attention in 2015. Whether emerging or already established as a focus of federal policymakers, our professionals are monitoring these issues closely:

- **Biofuels** – After biofuel industry proponents successfully turned back the Administration's initiative to reduce the 2014 required volumetric obligations (RVO) under the Renewable Fuels Standard (RFS) program at EPA, it is unclear if EPA will resume efforts to reduce RVO obligations in 2015. RFS opponents on Capitol Hill will resume legislative efforts to repeal or alter the market making program for alternative renewable fuels. Continuation of the expired biofuels tax incentives will be an industry priority this year. Congressional critics of the Department of Defense drop-in fuels initiative likely will seek to discontinue that program this year through either the Defense authorization or appropriations bills.

- **Coal** – Coal sector supporters in Congress will focus on Administration oversight of the President’s Climate Action Plan and proposed rules to regulate coal generators and producers. Legislation to prevent the Administration from implementing its rules, likely in the form of provisions in appropriations bills and, perhaps, reconciliation, will be considered in 2015. Administration restrictions on funding international coal projects for U S corporations through the Export Import Bank and other international finance agencies are one target for Congress. As discussed above, Administration regulatory efforts will include issuing final rules this summer to regulate GHG emissions from both new and existing coal power plants.
- **Columbia River Treaty** – Last May, the bipartisan 26 member congressional delegations from Idaho, Oregon, Montana and Washington called on the Administration to act on the future of the Columbia River Treaty. The Northwest congressional delegation, as well as public power, navigation, irrigation and other stakeholder groups, is likely to continue to call upon the Administration to act on the Treaty’s future in 2015.
- **Commodity Futures Trading Commission (CFTC) Regulation** – The CFTC is expected to finalize rulemakings on margin requirements for uncleared swaps and position limits and will continue further “tweaks” to its existing Dodd-Frank regulations. The Republican Congress likely will pass targeted amendments to the Dodd-Frank Act that seek to alleviate regulatory burdens for industry, including for commercial swap end-users. CFTC enforcement in the energy sphere could increase in 2015.
- **Crude Oil Market Implications** – One of the biggest recent developments in the energy arena has been the precipitous decline in the price of crude oil. All indications point to the price decline persisting for some time, and crude oil prices may stabilize at a price lower than previous highs. Low crude oil prices also could have unforeseen public policy implications. The budgets of a number of crude oil producing states have been adversely affected by the lower price of crude oil. While there remains strong opposition to raising gasoline taxes to stabilize the highway trust fund, lower priced crude oil and lower priced gasoline brings such an action at least into the outer realm of possibility.
- **Cybersecurity** – Major data breaches continue at an alarming rate. Cybersecurity remains a hot topic across all sectors of the economy, especially with respect to the electronic protection of critical infrastructure. Broad support from industry exists for cybersecurity information-sharing legislation, which stalled in the Senate in the 113th Congress. Absent new legislation, the White House has issued an Executive Order promoting private sector cybersecurity information sharing, and is launching a Cyber Threat Intelligence Integration Center to coordinate cyber threat intelligence and assessments among agencies. The President’s Budget includes \$14 billion for enhanced cybersecurity efforts across the Government. Legislative efforts to address cybersecurity will continue in 2015. The White House recently announced a renewed push for bipartisan cybersecurity legislation in the 114th Congress.
- **Department of Defense (DOD) Renewable Energy Initiatives** – All branches of DOD continue their own efforts to procure renewable energy for installations across the country. We do not expect the new Defense leadership in the Senate – Senator John McCain (R-AZ) and Senator James Inhofe (R-OK) – to challenge these efforts, due to the national security implications of diverse and secure energy sources for our installations, and because industry-owned and operated renewable energy facilities are expected to result in a cost savings to the DOD.
- **Electricity Regulation** – FERC will focus on financial returns, capacity markets and infrastructure needed to comply with the EPA-proposed Clean Power Plan. Return on equity (ROE) in transmission ratemaking continues to be a hotly contested issue. In a recent case challenging the return earned by transmission owners in New England, FERC reduced base ROE from 11.14% to 10.57% and announced a new analytical methodology for evaluating electric utility ROE. How this new approach will be applied in a range of circumstances will be the subject of much administrative litigation in 2015.

Stresses concerning capacity markets in regional transmission organizations (RTOs) continue to plague the sector. There are questions about whether current structures are providing effective incentives for investment in new resources and whether the resulting consumer price impacts are reasonable. The D.C. Circuit recently held that FERC does not have jurisdiction over the participation of demand response providers in organized markets, a decision that raises considerable doubt about the role of demand response in capacity markets. FERC has asked the Supreme Court to review this decision.

The ability of the electricity sector to develop timely new infrastructure could be tested by EPA's proposed Clean Power Plan rule limiting CO<sub>2</sub> emissions from existing power plants. Will resource adequacy policies be sufficient to drive needed new clean generation development to offset plant retirements? Will the regulatory policies of FERC and other regulatory agencies support the new grid and pipeline infrastructure development that is needed to serve the high volume of added renewable and gas-fired generation contemplated by the EPA rule?

In April 2015, Commissioner Bay will become Chairman of FERC. How this change in leadership may affect the FERC policy agenda is not yet clear.

- **Endangered Species Act (ESA)** – The last Congress saw the development, introduction and passage of the most significant ESA legislation to be considered by the House of Representatives in nearly a decade. While the legislation was not acted upon by the Senate, House lawmakers have indicated their commitment to continue to press for legislative reforms to the ESA. Senator Jim Inhofe (R-OK), the new chairman of the Senate Environment and Public Works Committee, has cited ESA modernization as one of the top three issues for the new Congress. The majority staff of the committee has begun engaging in discussions with stakeholders for input on ideas and strategies for pursuing this objective. In the House, new Natural Resources Committee Chairman Rob Bishop (R-UT) leads an experienced committee and has indicated that legislative reform of portions of the ESA is a priority, as is oversight of actions by the Administration in implementing the existing law.

The Administration is expected to continue to propose regulations and other executive actions that will have a significant impact on ESA implementation. The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) have proposed broad modifications to the critical habitat designation process and clarifications to voluntary conservation opportunities. More ESA implementation proposals are expected from these two lead agencies in the next two years.

- **Energy Efficiency** – Energy efficiency will be a prominent tool for reducing CO<sub>2</sub> emissions. Investment in increased energy efficiency plays a key role in EPA's proposed Clean Power Plan. While the EPA proposal does not require states to use energy efficiency as part of their compliance strategies, economic analysis suggests that it is a low cost option for reducing CO<sub>2</sub> emissions. The magnitude of increased investment in energy efficiency driven by the rule will depend on the details of those state compliance plans, which would not be due until mid-2016.

DOE continues to pursue rulemakings to strengthen minimum efficiency standards for appliances and other energy-consuming equipment. DOE is also pursuing an active program of enforcement of these efficiency standards and has, for the first time, imposed civil penalties in excess of \$5 million on manufacturers of noncompliant products.

- **EPA Motor Vehicle Regulation** – EPA and the National Highway Traffic Safety Administration (NHTSA) are scheduled to propose the second phase of GHG/Fuel Economy standards for Medium and Heavy Duty Trucks in spring 2015. These standards will be more technologically challenging than existing standards and remain controversial because of proposed testing procedures. EPA and NHTSA will continue to collect and

evaluate data in preparation for the Mid-Term Review of Model Year 2021-2025 GHG/Fuel Economy standards for Passenger Cars and Light-Duty Trucks that begins in 2016.

- **Federal Funding** – With all federal agencies except Homeland Security funded through the FY15 CRomnibus, we expect these agencies to continue to issue RFPs during the second and third quarters in order to allocate and obligate FY15 funds before the end of the fiscal year (October 1, 2015). Clients interested in understanding the funding opportunities released by the federal agencies can review a list of [Current Federal Funding Opportunities](#) on our website and can sign up for our [Weekly Federal Funding Update](#).
- **Flood Insurance** – Brisk evolution in the geographic scope and regulation of floodplains is likely to continue throughout 2015. On January 30, 2015, President Obama signed an Executive Order “Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input,” which modified the prior Executive Order 11988 regarding how federal agencies approach federal actions within floodplains. This new Executive Order will require all federal agencies to update their regulations to expand the scope of regulated floodplains to take into consideration climate change. The Executive Order will also implement a new Federal Flood Risk Management Standard to ensure that federal actions (i.e., actions involving federal lands, federal financing or assistance, or federal programs or approvals) that are located in or near a floodplain take into consideration evolving risks, climate change and other vulnerabilities over the intended lifetime of the project.

The Federal Emergency Management Agency (FEMA) is continuing its work to incorporate Endangered Species Act (ESA) compliance into its implementation of the National Flood Insurance Program (NFIP) nationwide. NOAA-Fisheries is poised to issue FEMA an ESA Biological Opinion in Oregon demanding significant changes in FEMA’s implementation of the NFIP in Oregon and likely throughout the west coast. FEMA also will continue working on a nationwide Environmental Impact Statement analyzing the effect of the NFIP and floodplain development on endangered species and critical habitat nationwide. These actions could result in a significant rule making that will expand the areas FEMA regulates as floodplains and increase the stringency of the development regulations applicable to these areas.

Finally, FEMA will continue to implement its new policy for mapping areas affected by levees once it receives and integrates the results of several pilot projects.

- **Government Spending/Debt Status** – The debt ceiling is most recently projected to be reached on March 15, 2015, although the Treasury Department has indicated that it will delay exceeding that limit until August or later by utilizing “extraordinary measures.” The bipartisan budget agreement that provided FY2015 government funding expires on September 30, 2015, although funding for the Homeland Security Department expires February 28, 2015. The Republican controlled House and Senate Budget Committees will be working to put together a Budget Resolution that addresses spending levels for FY 2016, the debt ceiling, sequestration that was required by the Budget Control Act of 2011 to reduce government spending, and, probably, budget reconciliation instructions.
- **Healthcare** – Congress will continue action to repeal or modify the ACA while awaiting the Supreme Court’s ruling this summer in *King v. Burwell*. The *King* case tests the legality of insurance premium subsidies through the federal health insurance web site. Congress is also focused on bills to improve the drug and device R&D and approval process and to replace the current system for determining Medicare payments for physicians known as the Medicare Sustainable Growth Rate (SGR).
- **Hydropower** – The 114th Congress offers a significant and unique opportunity for extensive licensing and regulatory reform for hydropower. In the Senate Energy and Natural Resources Committee, Chairman Lisa Murkowski (R-AK) and Ranking Member Maria Cantwell (D-WA), both of whom represent hydro-rich states

and have significant experience with hydropower issues, have expressed an intent to move hydropower reform, either as stand-alone legislation or as part of a larger energy package. Republicans in the House, particularly Congresswoman Cathy McMorris Rodgers (R-WA), continue to prioritize hydropower reform.

- **National Environmental Policy Act** – Improving the implementation of the National Environmental Policy Act (NEPA) has been a goal of multiple Administrations and Congress. In 2015, we expect the Administration to continue its push for a broader analysis of climate change impacts within NEPA reviews. In Congress, upcoming debates on infrastructure programs, as well as on energy programs and policies, will present opportunities for legislation on “streamlining” and other improvements to the NEPA review process. Key targets for improvements may include firm deadlines for completion of NEPA reviews; transparency measures, judicial review procedures and increased use of pre-application reports to facilitate agency reviews.
- **Oil and Gas Infrastructure** – In 2015, the nation’s need for increased energy infrastructure will continue to clash with environmental objectives and new environmental regulations. In January, the Obama Administration released a “blueprint” for [addressing methane emissions](#) by the oil and gas sector. The EPA is also working to update the air quality standards for ground-level ozone, publishing a proposed rule in the Federal Register on December 17, 2014. At some point in 2015, the Bureau of Ocean Energy Management is expected to release air quality reporting requirements for offshore oil and gas operations.
- **Ozone Standards** – EPA will finalize revisions to the ozone national ambient air quality standard (NAAQS), currently set at 75 parts per billion (ppb). Last year, EPA issued co-proposals to reduce the limit to either 65 or 70 ppb, but also took comment on maintaining the current level. Either revision would result in a significant increase in the number of “nonattainment” areas; such areas face stringent restrictions on development. EPA is accepting comments until March 17 and is under a court order to finalize the rule by October. Implementation of the rule will be a multi-year process.
- **Pipeline Safety** – Congress will reauthorize the Pipeline Safety Act and the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA) is expected to issue significant and long-delayed rulemakings. Congress will begin reauthorization discussions later this year, while PHMSA still has a number of outstanding study and rulemaking mandates from the prior reauthorization in late 2011. It remains to be seen whether Congress will advance a “clean bill” and allow PHMSA to complete its outstanding tasks or open the Pipeline Safety Act to further substantive amendments. PHMSA anticipates issuing key proposed rules applicable to natural gas and hazardous liquids pipelines in the first half of the year. Notable potential rule changes include extending pipeline safety requirements to certain currently exempt pipelines, strengthening integrity management programs and requiring the validation of pipeline pressures and pipe materials properties. You can follow the status of all of the moving parts by [subscribing](#) to Van Ness Feldman’s bi-weekly Pipeline Safety Updates.
- **Reliability** – The potential reliability impacts of the Clean Power Plan, the transition to Critical Infrastructure Protection (CIP) version 5 standards, and the implementation of new physical security standards will be among the top reliability issues in 2015. FERC recently approved NERC’s proposal for risk-based compliance monitoring and enforcement of reliability standards. In 2015, FERC will also act on NERC’s proposal to remove compliance obligations for about 200 entities that have little to no impact on the reliability of the Bulk-Power System, and reduce the compliance burden for an additional 500 entities.
- **Renewable Energy** – The debate regarding tax incentives for wind, biomass, geothermal, hydrokinetic, and other renewable technologies likely will continue well into 2015. The retroactive extension of the Renewable Energy Production Tax Credit (PTC) on December 19, 2014 and its expiration on December 31, 2014, continues the uncertainty for investors and developers of new renewable energy projects. Republican control of the House and Senate increases the level of uncertainty, since a majority of Republicans oppose



the extension of the PTC. Extension of the PTC will be under review by the House Ways and Means and the Senate Finance Committees during their consideration of tax reform legislation and in the tax extenders package, if, as expected, Congress determines that tax reform can't be completed this year.

- **Tax Reform/Tax Extenders** – House Ways and Means Committee Chairman Paul Ryan (R-WI) and Senate Finance Committee Chairman Orrin Hatch (R-UT) have both said they intend to consider tax reform legislation this year. Given that the 2016 election cycle will be in high gear before the end of this year, the committees will have to act before the August recess, if tax reform is to be completed before the 2016 elections. At this point, it is unlikely this Congress will be able to move a tax reform package all the way through the process, but the two Committees will make every effort to advance tax reform.

During the tax reform debate, there will be discussions by the committees of the individual expired/expiring tax provisions as the Committees decide what provisions will be included in a reformed tax code and what provisions will not be included. Once the effort has reached what is likely to be an unsuccessful end, the work that has been done to analyze the expired/expiring tax provisions could lead to the development of a package that extends only the provisions that the committees have determined should be in a reformed tax code. In addition, there may be another effort to make some provisions, like the R&D tax credit and bonus depreciation, permanent. Consideration of a temporary extension of the package of expired/expiring tax provisions will be one of the last items Congress addresses before they adjourn for the year.

- **Transportation and Infrastructure** – Reauthorization of the surface transportation authorization bill (MAP-21) already has received considerable attention in the 114th Congress, and has been identified as a high priority by both Congress and the Administration. MAP-21 is operating under a short-term extension, which will expire at the end of May 2015. The Congressional Budget Office has projected that the cost of a six-year reauthorization bill at current funding levels would require over \$100 billion in additional revenues for the highway trust fund. A gasoline tax increase to pay for the bill is unlikely politically. However, key Republican support has emerged for funding a reauthorization bill through tax reform. A short term extension – or in all likelihood, a series of extensions – and an infusion of cash from the general treasury will be necessary to keep current programs running and allow more time for Congress to coalesce around an acceptable plan for ensuring the long term viability of the highway trust fund.

Other surface transportation issues that may again receive legislative attention in the 114th Congress include reauthorization of the Passenger Rail Investment and Improvement Act (PRIIA), reauthorization of the Surface Transportation Board (STB), crude-by-rail regulations, implementation of Positive Train Control (PTC), and reauthorization of the Federal Aviation Administration (FAA) which expires in September 2016. While freight and passenger rail issues were deliberately left out of previous surface transportation bills, these issues could be combined as the legislative process proceeds.

- **Tribal Economic Development** – Congress and the Administration will consider actively the issues of tribal leaders, their business partners, and advocates for economic development in Indian Country. Energy projects in Indian Country will be front and center in Congress as the new Chairman of the Senate Committee on Indian Affairs, Sen. John Barrasso (R-WY), is sponsoring significant legislation that would enhance the ability of tribes to promote development of energy resources on their lands. The legislation, which has bipartisan support in the Senate and could be included in broader comprehensive energy legislation, seeks to amend the Tribal Energy Resource Agreements (TERAs) provision of the Energy Policy Act of 1992 to provide tribes with greater authority to enter into leases and business agreements for energy development projects on tribal lands. Additionally, the legislation would limit the role of the Secretary of the Interior in the review and approval of leases where a tribe is operating under an approved TERA.

The Bureau of Indian Affairs (BIA) of the Department of the Interior (DOI) is expected to issue a final rule revising the process for negotiating and securing rights-of-way across tribal lands. The BIA's proposed



version of the rule indicated that tribes will have greater authority over the particulars of individual rights-of-way, so businesses and stakeholders will need to understand how to engage tribes directly on these issues more than ever before. The process of taking lands into trust for Indian Nations will also get considerable attention with the promulgation of land-into-trust rules for Alaska tribes, the expected conclusion of related Alaska land-into-trust litigation in the U.S. Court of Appeals for the District of Columbia, and the continued appellate consideration of post-*Carcieri v. Salazar* tribal lands decisions under DOI's March 2013 opinion clarifying what constitutes a tribe "under federal jurisdiction" as promulgated in 1934.

Finally, tribes looking to boost economic development through new ventures in e-commerce – including Internet gaming and financial services ventures – will be watching Capitol Hill and the Administration carefully regarding controversial investigative tactics. With the Department of Justice (DOJ) and the Federal Deposit Insurance Commission (FDIC) efforts in 2013 and 2014 to eliminate politically controversial tribal enterprises through Operation Chokepoint, and the Federal Trade Commission's position that an assertion of tribal jurisdiction in an arms-length contract might be an unfair and deceptive trade practice with regards to non-Indian consumers – tribal leaders are raising questions about the legality of some tactics and how to reconcile agency positions with the federal trust responsibility.

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