
Energy Sector Alert Series: A Legislative Outlook

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Over the next eight weeks, we will provide a broad look at current and emerging issues facing the energy sector in a series of alerts. In this series, attorneys from across the firm will discuss issues ranging from environmental disclosures and risk management in business transactions to insolvency, compliance programs and intellectual property. Please [click here](#) to read all of our recent publications.

Following Congress' passage of a [\\$1.8 trillion dollar federal spending and tax break package](#) in December 2015, many political pundits might be inclined to think the era of gridlock is easing. While it is too early to tell whether this is indeed a new era of bipartisanship policy making, the ability of the White House and Congress to reach consensus on hot-button and controversial issues suggests that Washington is not entirely broken and is able to find common ground.

Unfortunately for those wishing a return to regular order and cross-party deal making immediately, 2016 will be dominated by the presidential campaign and general election, a shortened legislative calendar, and the inevitable political votes that are used to highlight key differences between the parties to potential voters. Although the House and Senate are not expected to consider much substantive legislation this year, significant work on energy and environmental matters is still possible this session. Some of the issues likely to receive congressional interest include consideration of a comprehensive energy bill and passage of an update to the Toxic Substances Control Act (TSCA). Additionally, the aforementioned \$1.8 trillion dollar spending deal included a historic agreement to lift the nation's 40-year-old ban on oil exports. With the plummeting of oil and gas prices and the associated damage to energy producing states, there will certainly be congressional efforts to expedite further exports of such petroleum products.

The Obama Administration is also expected to put forward multiple "legacy" rules addressing climate change. These rules will likely see strong disapproval from the Republican controlled Congress.

Comprehensive Energy Legislation

The Senate began considering a bipartisan, comprehensive energy bill, the [Energy Policy Modernization Act of 2015](#) this week. The bill, which was introduced by Senate Energy and Natural

Resources Committee Chairwoman Lisa Murkowski (R-AK) and Ranking Member Maria Cantwell (D-WA), would expedite permitting for liquefied natural gas exports, boost energy-efficiency standards for commercial and federal buildings, permanently reauthorize the Land and Water Conservation Fund, and require infrastructure upgrades to ensure grid reliability and security. A section-by-section summary of the bill can be found [here](#).

The bill is expected to undergo an open amendment process, which will allow legislators to offer measures designed to target the Obama Administration's policies on federal coal leases and renewable fuel standards. While most of these amendments are likely to fail, the overall prospects of the bill remain uncertain.

In December, by a vote of 249-174, the [House passed](#) its version of comprehensive energy reform ([H.R. 8](#)) mainly along party lines. The House legislation would streamline the export of liquefied natural gas, expedite gas pipeline permits, and direct federal agencies to coordinate better on grid reliability issues. The House-passed bill faces a [veto threat](#) from President Obama due to several controversial regulatory provisions. According to the administration, H.R. 8 would "undermine already successful initiatives designed to modernize the nation's energy infrastructure and increase our energy efficiency."

Toxic Substances Control Act

The House and Senate hope to reconcile their two TSCA reauthorization bills early this year. On December 17, 2015, the [Senate passed](#) the [Frank R. Lautenberg Chemical Safety for the 21st Century Act](#) by a unanimous voice vote.

The bill would require the EPA to establish a risk-based prioritization process to screen chemicals currently in use and create a premanufacture review process for new chemicals. Under the new bill, the EPA would be able to collect fees for conducting chemical assessments. The new legislation would also address how federal chemical oversight policy interacts with state laws; specifically, the bill would preempt state laws that conflict with an EPA requirement regarding a specific chemical use or restriction.

The House passed their version of the chemical bill, the [TSCA Modernization Act](#), on June 23, 2015, by a 398-1 vote.

Senator James Inhofe (R-OK), Chairman of the Senate Environment and Public Works Committee, and his counterpart Fred Upton, Chairman of the House Energy and Commerce Committee, hope to reconcile the bills—formally or informally—during the first quarter of 2016. And while issues dealing with [preemption of states' ability to regulate toxic chemicals](#) will be subject to debate, the final version of the TSCA update will likely pass Congress with relative ease. The Toxic Substance Control Act was last updated 40 years ago in 1976.

Renewable Fuel Standard

The [Renewable Fuel Standard](#), the federal program that requires transportation fuel sold in the US to contain a minimum volume of renewable fuels—including highly debated (and election year

important!) ethanol—will be another hot topic during the 2016 election year. After a decade since its introduction, Congress has been unable to reach an agreement on how to legislate changes to the renewable fuel standard. And although it appears unlikely that a compromise on legislation will be achieved in a general election year, expect continued congressional attention on the issue, starting with an early February hearing before the House Oversight and Government Reform Committee.

Environmental Regulations and Congressional Review

As President Barack Obama continues to define and solidify his legacy, it is expected that the Environmental Protection Agency will attempt to complete multiple high-profile regulations designed to address climate change. Those include regulations include rules on methane emissions from new oil and gas operations, strengthened federal efficiency standards for medium- and heavy-duty trucks, and a formal finding that greenhouse gas emissions from aircraft endanger human health and the environment.

That said, expect congressional Republicans to challenge a number of the administration's climate and environmental regulations this year, including the Clean Power Plan, ozone rules, methane rules, emission controls for refineries, and Water of the United States. Under a rarely used law—the [Congressional Review Act](#)—Congress, by passage of a joint resolution, can block a new executive branch regulation within 60 days of its publication. Majority Leader McConnell has vowed to use the measure to address many of the administration's environmental regulations, especially those that relate to coal.

Notable Cases Before the Supreme Court

Before the Supreme Court this term are two Federal Energy Regulatory Commission (FERC) cases that could define the line between federal and state authority in the energy markets.

On Monday, January 25, in [FERC v. Electric Power Supply Association](#), the Court [ruled](#) that FERC does have the authority to offer incentives to reduce power consumption during peak demand periods by paying large users to curb their electricity use, an approach called “demand response.”

The demand response approach was challenged by electricity generating companies, who argued that FERC could only regulate wholesale sales of electricity and that its program intruded on state regulators' power to regulate retail sales.

Justice Elena Kagan, writing for the majority, said that the demand response approach “governs a practice directly affecting wholesale electricity rates. And although (inevitably) influencing the retail market too, [it] does not intrude on the States' power to regulate retail sales.” She also added that “in choosing a compensation formula, the Commission met its duty of reasoned judgment. FERC took full account of the alternative policies proposed, and adequately supported and explained its decision.”

Justice Antonin Scalia and Clarence Thomas dissented from the majority opinion.

The decision is being hailed as a victory for environmentalists and federal power regulators. Because the case addresses the limits of the Federal Power Act, Congress may conduct oversight

hearings on the program and, possibly, consider legislation addressing the demand response program.

The second case before the Court this term is *Hughes v. Talen Energy Marketing*, which will examine whether the Federal Power Act preempts states with competitive power markets from running subsidy programs to develop new power plants. Oral arguments for the case have been set for February 24.

The Court will also hear environmental cases dealing with the jurisdictional determinations by the Army Corps of Engineers under the Clean Water Act (*United States Army Corps of Engineers v. Hawkes Co., Inc.*) and plaintiff standing in environmental cases (*Spokeo, Inc. v. Robins*).

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