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Time to Look to Washington, D.C.: Political and Regulatory Expectations for the 112th Congress, the Lame Duck Session, and Beyond

Notwithstanding popular perceptions, Congress and Federal agencies are considering, and could decide, a number of budget, funding, and regulatory matters within the next few months. Further, for at least one of the critical time periods for possible action, Members (and agency officials) may be focused on achieving the ends of certain partisan goals. One can almost hear the great monologue of Jefferson Smith (from, *Mr. Smith Goes to Washington*), "And you know that you fight for the lost causes harder than for any others. . . . Somebody'll listen to me!" During this time, energy and natural resource client interests can be carefully advanced by recognizing the currents on the Hill, and the recognized imperative to accomplish certain legislative and administrative goals.

Overview Despite the fact that 2012 is an election year, decisions affecting energy and the environment continue to be made at the legislative and regulatory levels. These decisions will be made during essentially three prescribed time periods: (1) up to the election; (2) during a "Lame Duck" session; and (3) immediately upon the swearing-in of the 113th Congress. The presidency will also have been determined, with tremendous potential for policy and fiscal decision-making. While all times have potential, we anticipate that more substantive decisions will be made during the expected Lame Duck Session of Congress, and the start of the 113th Congress in January, although the current Congress will continue, and possible accelerate, hearings to probe Administration policies and implementation, with at least a partial goal being political advantage.

Similarly, Federal agencies continue to spend their appropriated grant and contract funds, and to develop funding policies to guide Congress as it considers

new programs. Additionally, given the turmoil from troubled projects like that of the Solyndra Company, more serious attention is being given by Federal granting agencies, such as the U.S. Department of Energy, Environmental Protection Agency, Transportation, and Homeland Security, among others, to audit and to bring grant enforcement actions for non-compliance. Such actions, and non-actions, now have heightened political significance for Federal agency decisionmakers.

Three Blocks of Time Pre-Election General election campaigns for President and control of Congress are now in full swing. Every regulatory and legislative action by Federal decision-makers is influenced by the upcoming Presidential election. Each candidate wants to be seen as responsive to the high price of gasoline, to environmental responsibility, to renewable energy, and the like.

In addition, all Federal agencies, including the Department of Energy, are in a rush to use up outstanding grant funds and loan commitments, including de-obligated funds, before the end of the 2012 Fiscal Year. Importantly, Federal agencies are also accounting for, and using, “returned” grant funds; that is, funding from grantee repayment of ineligible grant items, from unused grant obligations, and from otherwise available funding. *Nota Bene*: the availability of these funds is often not publicized (and may not be well known in various agencies).

Congress is also working on spending bills for the upcoming 2013 Fiscal Year. We see continued efforts by DOE, Defense and other agencies on programs promoting renewable energy, for example. Concurrent with budget efforts are continued oversight activities by Congress, especially continued hearings by Oversight and Government Reform Chairman Darrell Issa (R-CA-49). The most recent hearing was May 16 and involved executives from four firms that received a total of \$5 billion from the DOE Loan Guarantee program.

We see how the debate over spending can affect specific energy programs for the upcoming fiscal year. In the Fiscal Year 2013 Defense Authorizations bill, for example, Members of the House and Senate are arguing over the funding level for the Department of Defense’s alternative fuels program. The armed services are integrating the use of advanced biofuels on their ships and planes. Senators support the program; however, House Members have included a provision that would prohibit the production or purchase of any alternative fuel, if the cost of same “exceeds the cost of a producing or purchasing a traditional fossil fuel that would be used for the same purpose” (Section 313 of H.R. 4310, the *National Defense Authorization Act for Fiscal Year 2013*). The question remains whether supporters of alternative fuels will be able to change this provision before a final version of the legislation reaches the President’s desk.

Lame Duck and the Perils of Procrastination Much is being written about the Lame Duck process, what its agenda might be and how returning Members will react to the decided pressures by leadership to achieve their respective goals (or to scuttle the potential of achieving certain things by a new Congress). But, the bottom line in both parties is that the Lame Duck session will be a time of tight organization and achievement of outstanding budgetary and program legislation.

Looking at pending matters, it is clear that many difficult “must decide” tax and spending decisions are being saved for the Lame Duck session. Further critical questions involve how Energy Programs will be affected by sequestration. Under the *Budget Control Act* agreed to last year by the President and Congress, \$1.2 trillion in automatic reductions are to take effect at year’s end. These will be equally split between defense and domestic spending (Public Law 112-25). Lobbyists are working in overdrive to undo some of these cuts. Energy funding may take a big hit unless Members of Congress hear from the companies – and employees – in their districts.

A number of tax credits for renewable energy are set to expire at the end of this year, unless renewed. They have been caught up in the debate over the Federal debt. For example, in March, Senator Debbie Stabenow (D-MI) offered an amendment in the Senate to legislation re-authorizing the surface transportation program (the follow-up to the *SAFETEA-LU* statute) that would have extended tax credits for the production of biodiesel and wind energy, as well as tax credits for the next generation of cellulosic biofuels, among other things (S Amdt. 1812 to S. 1813, the *Moving Ahead for Progress in the 21st Century Act (MAP-21)*). It did not receive the 60 votes needed for passage, in part because of the broader debate on spending.

The 113th Congress Control of the House of Representatives is expected to remain with the Republicans, meaning Chairman Issa, and Energy and Commerce Chairman Fred Upton (MI-6), should retain their gavels. Developing working relationships with the Chairmen and their staffs is highly important.

Control of the Senate and the Presidency is up for grabs, according to most political pundits. The outcome may well be affected by the influx of money spent on the candidates by various “Super PACs.” Whatever the outcome, the President will attempt to set his mark and direction on the new Congress: Governor Romney, for example, should be expected to work to undo many of the decisions of the Obama Administration, from health care, to financial regulation, to energy and environmental policy. On the other hand, if re-elected, President Obama has promised to move forward on renewable energy matters and efforts to cut carbon emissions. Given the impact of these elections, the atmosphere is that, as Mr. Smith said, “You fight for the lost causes harder than for any others.” And legislatively, we could likely see many of the battles of the 113th Congress begin

anew, especially if the 113th Congress tries to undo the cuts of sequestration. This will affect energy spending for the remainder of Fiscal Year 2013 as well as Fiscal Year 2014.

Advancing During Turmoil Companies, non-profits, and public sector entities with energy, environmental and natural resource issues should plan on presenting their “asks” within these three time periods. New opportunities may quickly arise, such the announcement on June 5th by Senate Environment & Public Works Ranking Member Lisa Murkowski (R-AK), that she intends to develop a policy proposal this summer “reimagining” a domestic energy policy, consistent with themes of affordability, environmental considerations, and security. Pending bi-partisan energy legislation has been stalled with competing amendments, and the Murkowski effort could result in a new and acceptable legislative direction. New requests of Congress, including regarding funding requests, should not be deferred until the new Congress is seated, when competition among many interests is expected. Federal grant funding, as well, should be sought, as agencies such as the Department of Energy, and the Environmental Protection Agency, may need to allocate existing, or returned, grants prior to the end of the Federal Fiscal Year.