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**AKIN GUMP**  
**The Global Energy Industry:**  
**2014 Year-End Energy Briefing**

December 10, 2014

## Our Speakers



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# The Future of the U.S. Wind Industry

**Edward Zaelke**

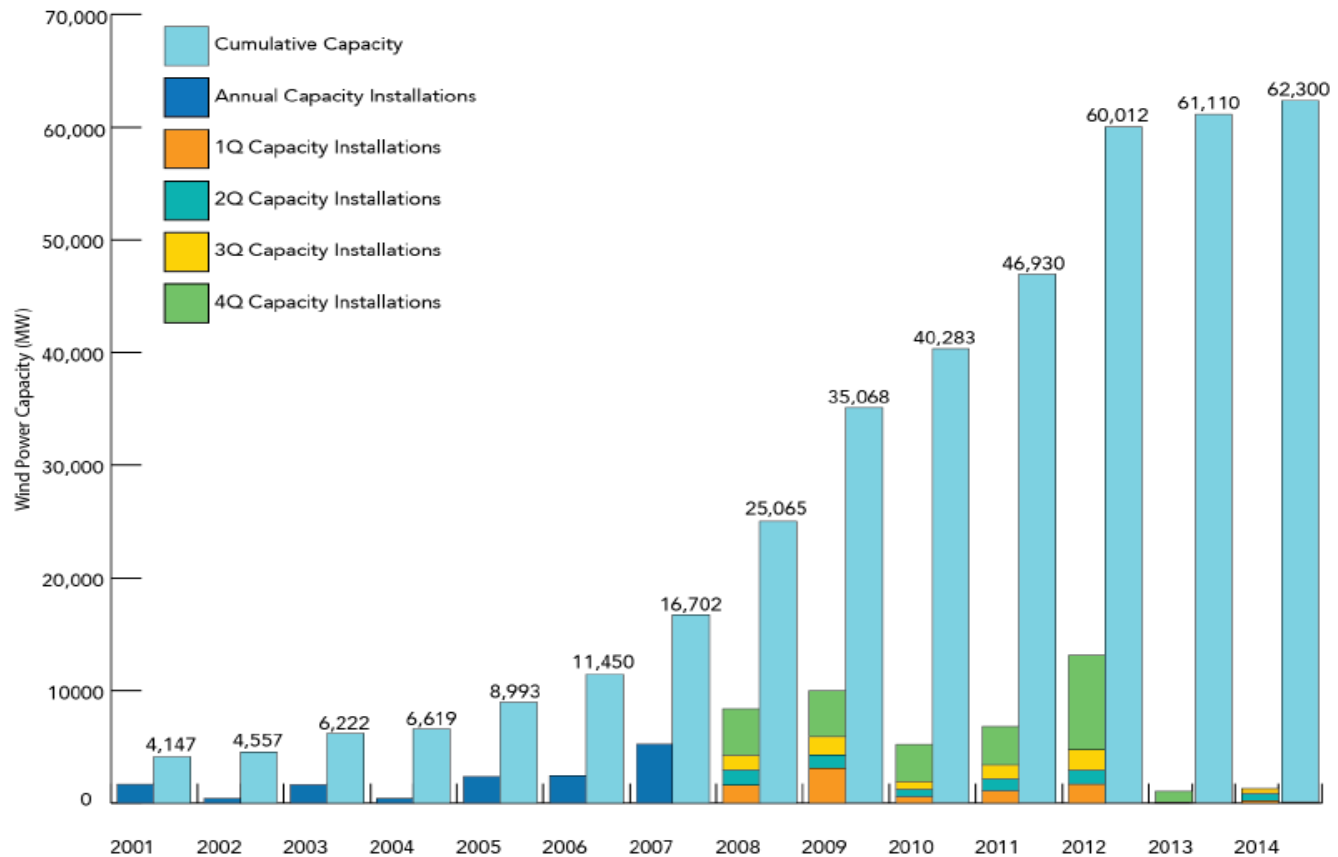
Partner, Chair of Global Projects and Finance Practice

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## U.S. Annual and Cumulative Wind Power Capacity Growth

With the completion of 419 MW during the third quarter, the U.S. wind industry now has 62,300 MW of installed capacity

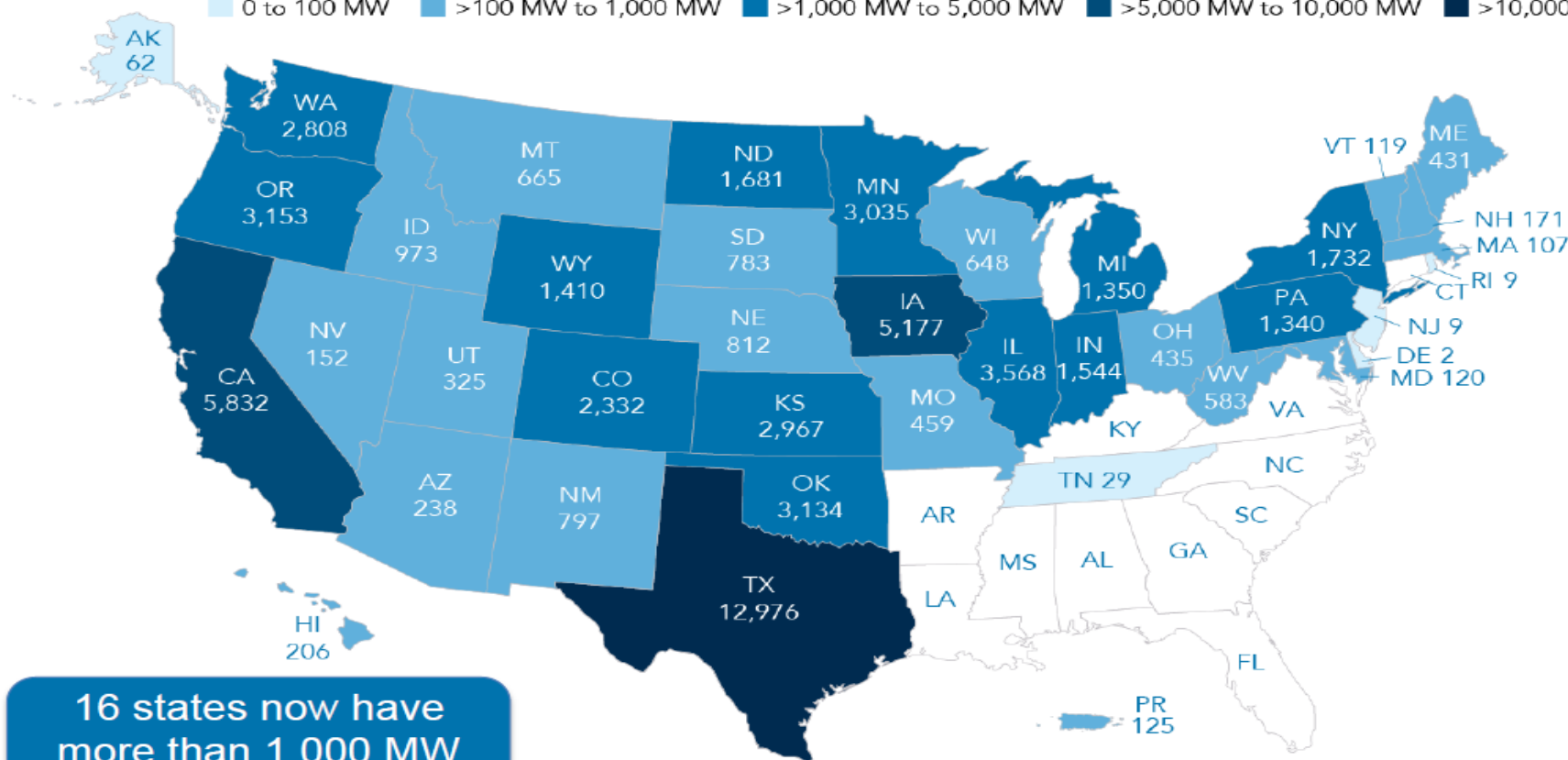


Source: AWEA U.S. Wind Industry Third Quarter 2014 Market Report



## Map of Wind Power Capacity Online

■ 0 to 100 MW   
 ■ >100 MW to 1,000 MW   
 ■ >1,000 MW to 5,000 MW   
 ■ >5,000 MW to 10,000 MW   
 ■ >10,000 MW

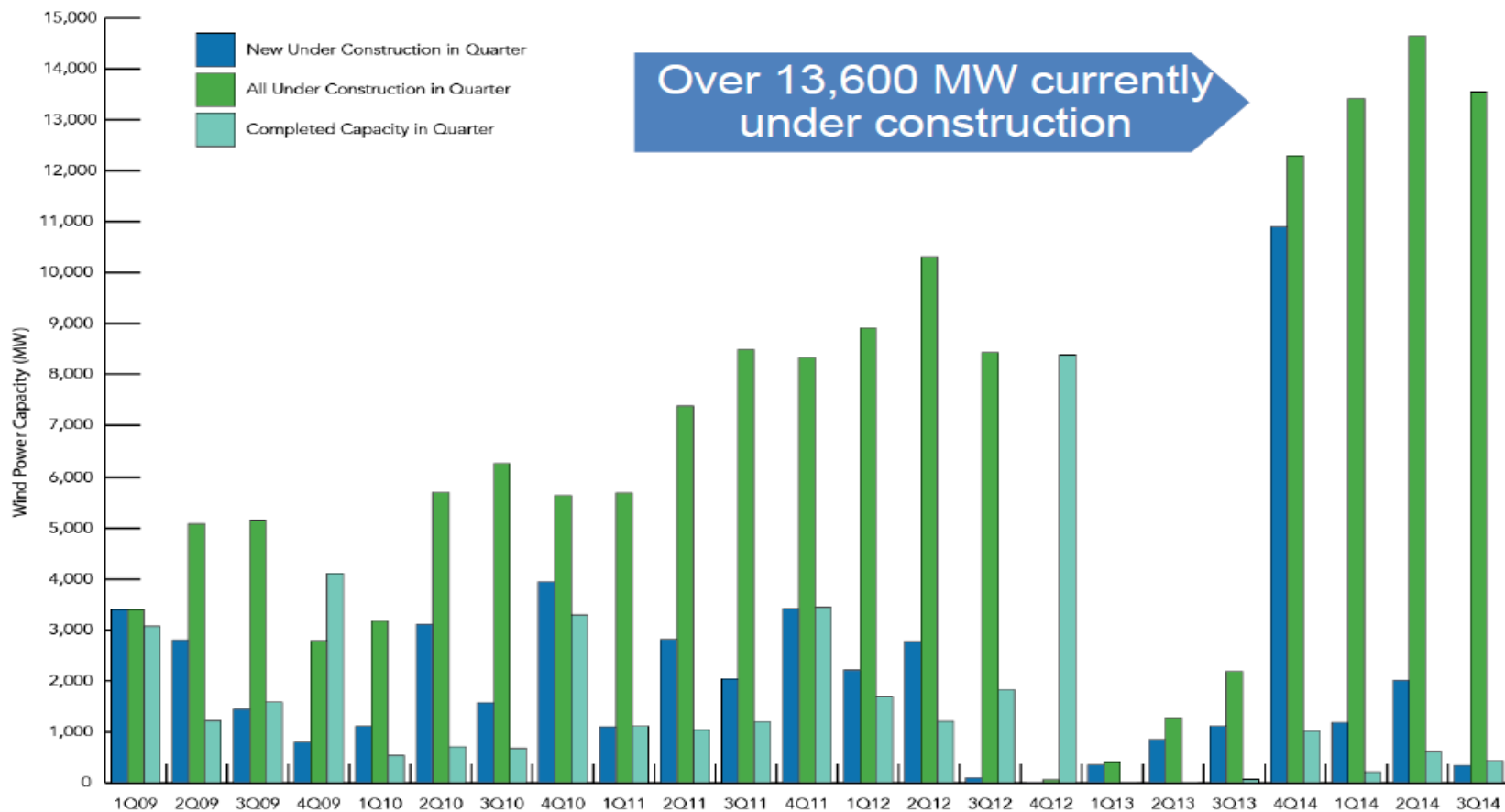


**16 states now have more than 1,000 MW of installed wind**

Source: AWEA U.S. Wind Industry Third Quarter 2014 Market Report



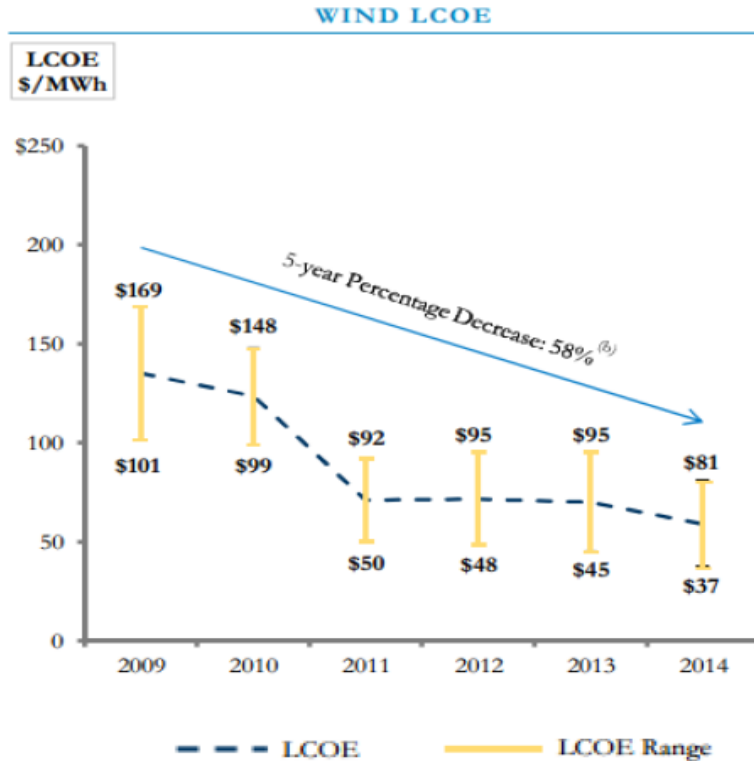
## Wind Power Capacity Under Construction



Source: AWEA U.S. Wind Industry Third Quarter 2014 Market Report



# The Declining LCOE of Wind Power



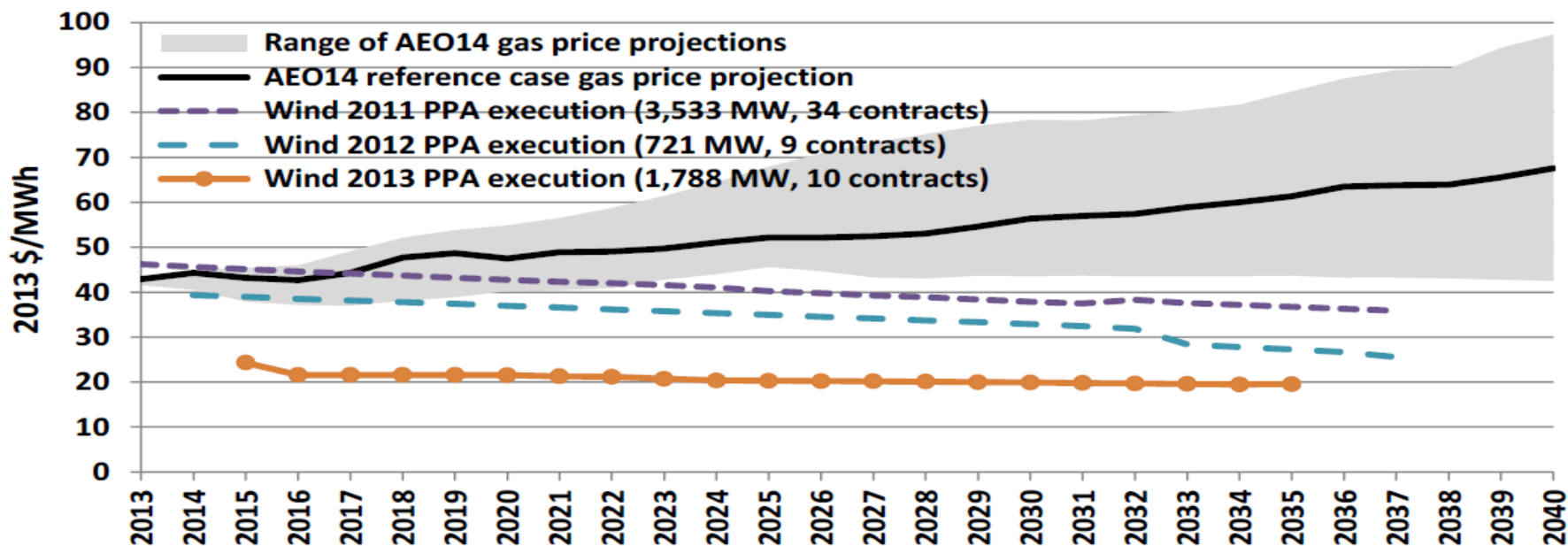
- Over the past 5 years, the levelized cost of energy for wind power has declined 58%

Source: Lazard's Levelized Cost of Energy Analysis – Version 8.0



## Wind as a Long Term Hedge

### Wind Prices (w/ PTC) Are Hard to Beat: Below the Current & Expected Future Cost of Burning Fuel in Natural Gas Plants



Source: A Preview of the 2013 Wind Technologies Market Report, LBNL





## Wind Production Tax Credit – Will It Continue?

- What's happening in Congress?
- What are its prospects for further renewal in the next Congress?
- Is a phase down or a phase out likely?

## Questions



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## Election Overview and Energy Policy Outlook

December 10, 2014

## Recap of 2014 Election Results

### ■ Republicans control both House and Senate

- House: 246 Republicans, 188 Democrats  
(Current: 233 Rs, 199 Ds)

- Senate: 54 Republicans, 44 Democrats, 2 Independents  
(Current: 53 Democrats, 45 Republicans, 2 Independents)

### ■ 51 new House Members\*

- 35 Republicans, 16 Democrats

### ■ 13 freshmen Senators

- 12 Republicans, 1 Democrat

## Characteristics of 114<sup>th</sup> Congress

### ■ House of Representatives

- Largest Republican Majority since World War II
- Republicans Picked Moderate Up Swing Districts in New England and Mid-West
- Boehner Enters 114<sup>th</sup> Congress Strengthened
- Republican Conference Less Controlled by Tea Party
- New Members of Leadership Gives Conservatives a Voice
- Caveat: Cantor Surprise Defeat Still Reverberates
- Blue Dogs Retirements Cost Several Dem Seats
- Democratic Caucus Tilts More Left

## Characteristics of 114<sup>th</sup> Congress

### ■ Senate

- Role reversal of political parties
- Offense (Republicans now moving agenda forward) vs. defense (Democrats now seeking to protect policies)
- However, Senate Republicans **do not** have veto-proof majority (67 votes) or filibuster-proof majority (60 votes)
- Republican leadership may decide whether to pare back changes to filibuster rules made by Democrats

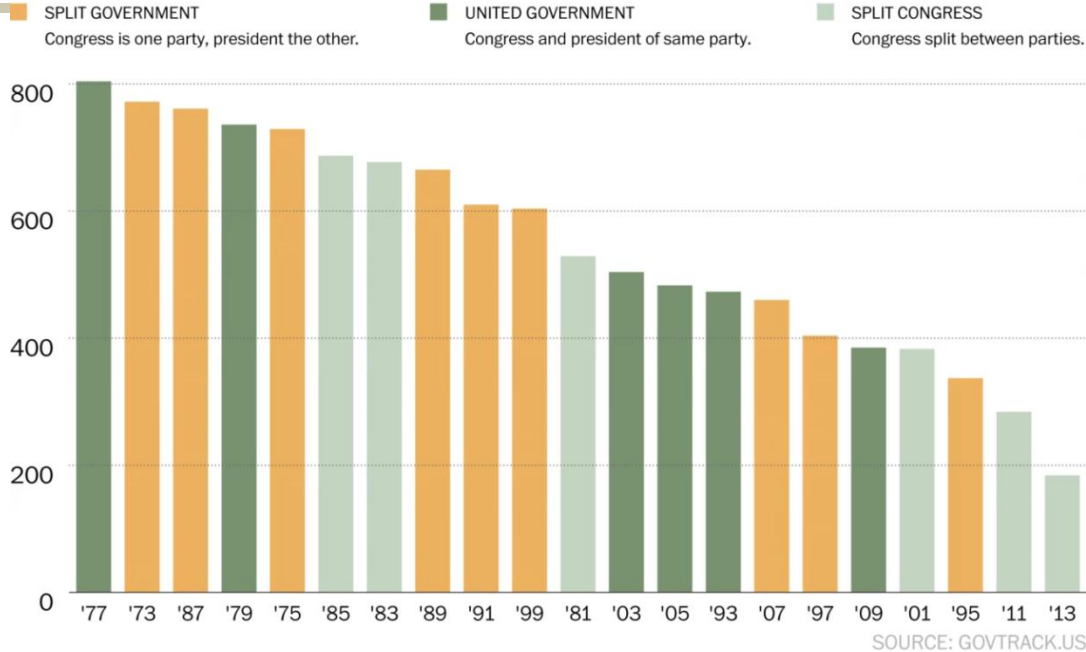
- Republicans focused on advancing a unified policy agenda with sights set on Republican White House in 2016

# Outlook for 114<sup>th</sup> Congress?



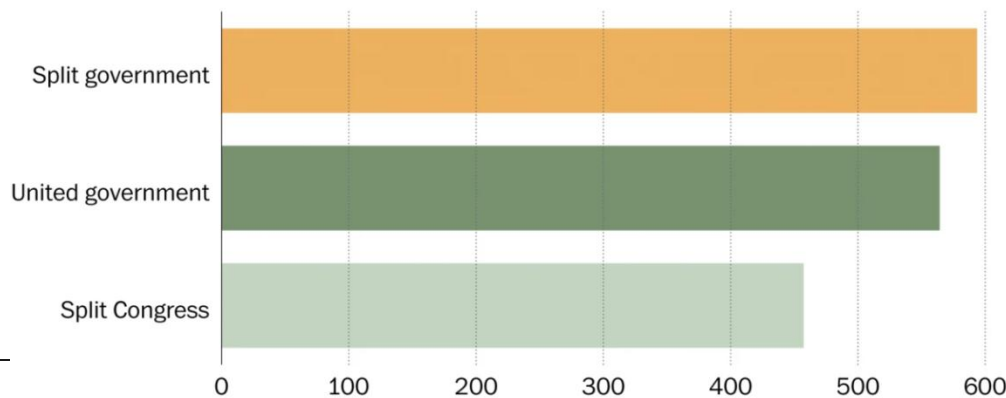
## Split governments pass more legislation

Six of the ten most productive Congresses since 1973 had a Congress held by one party and a presidency held by the other.



**Losing Senate could help make President Obama's last two years in office more productive, but expect him to exercise veto power**

### Average amount of legislation passed





## House Leadership

- Speaker: John Boehner (R-OH)
- Minority Leader: Nancy Pelosi (D-CA)

## House Energy and Commerce

- Chairperson: Fred Upton (R-MI)
- Ranking: Frank Pallone (D-NJ)

## House Ways and Means

- Chairperson: Paul D. Ryan (R-WI)
- Ranking: Sander Levin (D-MI)

## Senate Leadership

- Majority Leader: Mitch McConnell (R-KY)
- Democratic Leader: Harry Reid (D-NV)

## Senate Energy and Natural Resources

- Chairperson: Lisa Murkowski (R-AK)
- Ranking: Maria Cantwell (D-WA)

## Senate Finance

- Chairperson: Orrin Hatch (R-UT)
- Ranking: Ron Wyden (D-OR)

## Hot Topics

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- Keystone XL Pipeline
- Efficiency
- LNG and Crude Exports
- Offshore Exploration
- Greenhouse Gas Emissions
- Infrastructure
- Hydraulic Fracturing
- Quadrennial Energy Review
- Pen and Phone Strategy

## Keystone XL Pipeline

- Legislation passed multiple times in Republican-controlled House, likely to gain easy approval again during the 114<sup>th</sup> Congress
- In post-election vote, Senate failed by one vote (59-41) to gain 60 votes needed to overcome Democratic filibuster
- Incoming Majority Leader Mitch McConnell (R-KY) and Energy & Natural Resources Committee Chairwoman Lisa Murkowski (R-AK) have said the legislation will be resurrected when Republicans take control in the 114<sup>th</sup>
- Democratic support may decline in the 114<sup>th</sup> Congress
  - Moderate Democratic Senators previously voting in support of approving the pipeline will no longer be serving next Congress – e.g., Senators Kay Hagan (D-NC), Mary Landrieu (D-LA), John Walsh (D-MT)
  - Will complicate Republican efforts to reach 60 votes to overcome filibuster, or the 2/3 vote needed to override a Presidential veto

## Efficiency

- Area for potential bipartisan compromise
  - In 113<sup>th</sup> Congress - Senate committee adopted Shaheen-Portman bill and full House adopted Upton efficiency bill that mirrored Shaheen-Portman provisions
    - encourage continued private sector innovation
    - new factories and buildings built as efficient as possible
    - efficiency in government buildings and fleets
  - Key pillar of Murkowski and Upton energy plans
- Lame Duck
  - Shaheen/Portman seeking Senate action on package of House-passed bills
  - Absent lame duck vote, will seek early action in 114<sup>th</sup>
- Hurdles to date political, not substantive, and will determine future prospects
- White House supportive, but will continue to push efficiency absent legislation – e.g., Clean Power Plan

## Liquefied Natural Gas (LNG) Exports and Crude Exports

- Growing support for expedited LNG exports
  - Strongly advocated by Republican energy leaders
  - Republican House adopted legislation last summer to expedite application process for LNG exports
  - DOE Secretary Moniz recently indicated Administration may be open to deadlines
  
- Lifting crude oil export ban likely a longer-term initiative
  - Republicans more cautious about lifting ban
    - Former House Energy Chairman Joe Barton predicted House would vote to lift ban in 114
    - Other Republicans suggest moving slowly before considering a bill
    - Sen. Murkowski has urged Administration to ease export restrictions through existing administrative power
  - DOE has walked back from earlier statements of openness to lifting ban

## Offshore Exploration

- Central pillar of Republican energy agenda
- Key components
  - expanding offshore drilling as well as onshore drilling on federal lands
  - expediting federal permitting for energy production and for requiring Interior Department plan for OCS development and minimum production targets
  - expanding revenue sharing between the states and federal government for offshore drilling in federal territory
  - restoring revenue sharing for onshore production
- Democrats generally opposed
  - Shrinking number of Senate Democrats supporting offshore development
  - White House opposed and likely to veto pro-development legislation

## Greenhouse Gas Emissions

- “Reining in” EPA is top Republican Leadership priority
  - McConnell – stop EPA carbon standards for power plants and ozone air quality standards and roll back 2009 endangerment finding
  - Murkowski, Upton, Inhofe – will hold oversight hearings on Administration’s Clean Power Plan to reduce carbon at existing power plants; House is likely to take the lead on legislation to roll back plan and other GHG regulatory actions
  - Republicans may attempt to overturn GHG regulation through Congressional Review Act – expedited rules requiring 51-vote majority, no filibuster or amendments
- White House
  - Pledged to reduce GHG emissions 26-28% by 2025 in China agreement
  - Pushing forward with Clean Power Plan
  - Pursuing incremental program for states/localities to address climate change
  - Will veto Republican legislation to roll back GHG regulation
  - Some acknowledgement that comprehensive climate change out of reach over next two years

## Infrastructure

### ■ Central pillar of Republican energy plans

- Architecture of Abundance (Upton): approve Keystone XL pipeline; imposing deadlines on Executive Branch to rule on cross-border energy infrastructure projects; expedite review of natural gas pipelines
- Energy 20/20 (Murkowski): upgrading and improving electric transmission lines and natural gas and oil pipelines, and clarifying and reaffirming FERC role as lead federal coordinator

### ■ Some bipartisan appeal

- Some Democratic support in Congress for limiting approval process for energy infrastructure projects and need for more pipelines to address flaring and increase delivery
- Unlikely enough to overcome a filibuster or veto
- White House threatened to veto legislation that would impact presidential permitting authority for cross-border projects and impose deadlines on regulatory review of infrastructure projects



## Hydraulic Fracturing

### ■ Federal Agency Action

- BLM –
  - issued revised proposed rule in 2013 on hydraulic fracturing on federal and Indian lands
  - requires chemical disclosure; well-bore integrity to prevent groundwater contamination; water management plan in place for handling fluids that flow back to surface
  - final rule expected by year-end
- EPA –
  - studying potential impacts of hydraulic fracturing on drinking water resources; research scope includes full lifespan of water in hydraulic fracturing (pending)
  - issued draft guidance to federal permitting authorities for addressing potential risks associated with diesel fuel injection during hydraulic fracturing (2012)
  - finalized New Source Performance Standards and National Emissions Standards for Hazardous Air Pollutants for Oil and Natural Gas Wells (2012)
  - ANPRM seeking comment on establishing voluntary or mandatory federal disclosure requirements for chemical substances and mixtures under TSCA (2014)
- DOE – Shale Gas Subcommittee encourages additional fracturing fluids content disclosure, use of best practices, and elimination of diesel in fluids (2011)
- White House – Executive Order created interagency working group to “facilitate coordinated administration policy efforts to support safe and responsible unconventional domestic natural gas development” (2012)

## Hydraulic Fracturing

### ■ Congress

- House passed legislation to block BLM regulations in states that regulate hydraulic fracturing; died in Senate
- FRAC Act reintroduced in 113<sup>th</sup> Congress but saw no action
  - Eliminates SDWA exemption and mandates disclosure of fracturing fluids and proppants

### ■ State and Local Activity

- Will to continue to be regulatory driver
- New York Health Department review due in December
- Colorado Task Force report due in March
- Five municipal referendums passed in 2014 banning hydraulic fracturing in California, Ohio and Texas

## Quadrennial Energy Review

- President Obama Issued January 2014 Memorandum establishing a quadrennial energy review
  - To provide multiyear roadmap of Federal energy policy objectives, legislative proposals to Congress, Executive actions, and agenda for RD&D programs and funding, and financing and incentive programs
  - Focusing on energy infrastructure and identifying threats, risks, and opportunities for U.S. energy and climate security
  - Co-chaired by Director of the Office of Science and Technology Policy and the Special Assistant to the President for Energy and Climate Change, with Department of Energy coordinating interagency activities
  - DOE hosted 13 stakeholder engagement meetings across country to gather public input
  - QER reports will be due on January 31, 2015

## Pen and Phone Strategy

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- Climate Change Remains a Top Priority
- On Going Rulemakings
  - Power Plant Rule
  - Ozone
- Additional Regulatory Approaches
  - Methane

## Questions



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# Ukraine-Russia Sanctions Update

**Wynn Segall**  
Partner, International Trade

## Spotlight: U.S. Ukraine/Russia Sanctions and Export Controls

### ■ Three Executive Orders to Date (EOs 13660, 13661, 13662)

- Establish list-based sanctions: asset freezes/blocking of property
- Sanctions targeting factors include: status as a significant Russian company, particularly if within strategic sector/affiliated with key government officials; political “connections” and associations; source of wealth; location of assets or “exposure” within the U.S. or EU
- Broadly drafted, allowing for targeting of large range of individuals and entities, as well as activities, to be sanctioned.
- Target certain sectors of increased sanction risk (e.g. financial services, energy, metals, mining, engineering and defense and related materiel.)

### ■ OFAC Restrictions

- Ukraine-Related Sanctions Regulations (31 C.F.R. Part 589) to implement EOs
- Sectoral Sanctions Identifications (“SSI”) List - Directives 1-4
- OFAC General Licenses 1A, 2 and 3



Source: BBC

## Spotlight: U.S. Ukraine/Russia Sanctions and Export Controls

### ■ Sanctions Legislation

- **H.R. 4152** (Apr. 3, 2014) – Authority to sanction based on gross human rights abuses in Ukraine or significant corruption in either Ukraine or Russia.
- **Magnitsky Act** (Dec. 14, 2012) – Authority to sanction Russians alleged to be responsible for human rights abuses in Russia.

### ■ Ukraine-Related Sanctions Regulations (URSR) (31 C.F.R. Part 589 – May 8, 2014)

### ■ EU Targeted Sanctions (Full designations/sectoral sanctions/export controls)

### ■ BIS/DDTC Export Control Restrictions

- Restrictions on the export/reexport of “high technology” items subject to EAR and “high technology” defense items/defense services to Russia or Crimea that contribute to Russian military capabilities.
- BIS Entity List
- Russian Industry Sector Sanctions (15 C.F.R. § 746.5) Restrictions
- Recent BIS FAQs clarifying Ukraine-related export control measures



Source: BBC



## Effects on Russian/Ukrainian Companies That Have Connection To Sanctioned Individuals Or Entities

- **Application:** U.S. Ukraine-Russia sanctions apply to entities *owned* by sanctioned individuals or entities (50% rule, ownership vs. control)
- **Potential Effects of Sanctions Designation:**
  - Less access to capital and financing
  - Effects on disposition of assets abroad (U.S., Europe, and other countries with sanctions), including sale/transfer limitations
  - Difficulties with global sourcing and supply of equipment and technology
  - Difficulty maintaining certain banking arrangements and accessing services
  - Reputational harm and potential of divestment
  - Loss of business opportunities
  - Increased regulatory scrutiny in other areas (i.e., corruption/AML)
- **Point for Consideration:** What if your J/V partner (or a member of the Board) is designated as an SDN?

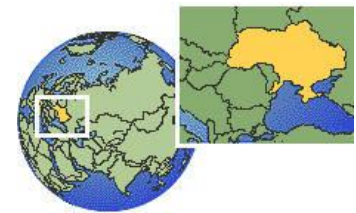
## Implications for Investments in Russia or Ukraine or with Russian or Ukrainian Companies

### ■ Companies should evaluate their risk exposure:

- Business activities, locations, personnel in Russia or Ukraine
- Investors, joint-ventures, business partners, subsidiaries
- High risk industries, including financial services, energy, metals/mining, engineering, defense

### ■ Considerations:

- How do the sanctions impact transaction structure or the source/supply of equipment/technology?
- Could project financing (sources, availability) be impacted?
- What is the differential impact in different regions (Europe vs. Asia, Africa, the Middle East, Latin America)?
- Is there a skewed impact on the commerciality of Russian companies partnering with companies from different countries?



- Need to conduct due diligence to determine if parties involved in investment, including financing entities, are owned/controlled by SDNs

## Questions

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# Mexico Reforms Update

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Partner, Global Projects & Finance

## Mexican Energy Reform: Overview

- **December 20, 2013** – Energy Reform Bill published modifying articles 25, 27 and 28 of the Mexican Constitution
- **August 6, 2014** – Secondary legislation approved
- **August 13, 2014** – Round 1 launch and results of Round Zero announced:
  - 83% of proven and probable reserves (2P) to PEMEX
  - 21% of Mexico's prospective reserves (3P) to PEMEX (they requested 31%)
- **November 28, 2014** – National Hydrocarbon Commission of Mexico (CNH) Administrative Provisions for Exploration and Extraction (E&E) Hydrocarbon Contracts published in Mexican Federal Official Gazette
- **December ???, 2014** – Round One bid basis (tender package) published
- **2015** Round One to be completed

## Mexican Energy Reform: Secondary Legislation Overview

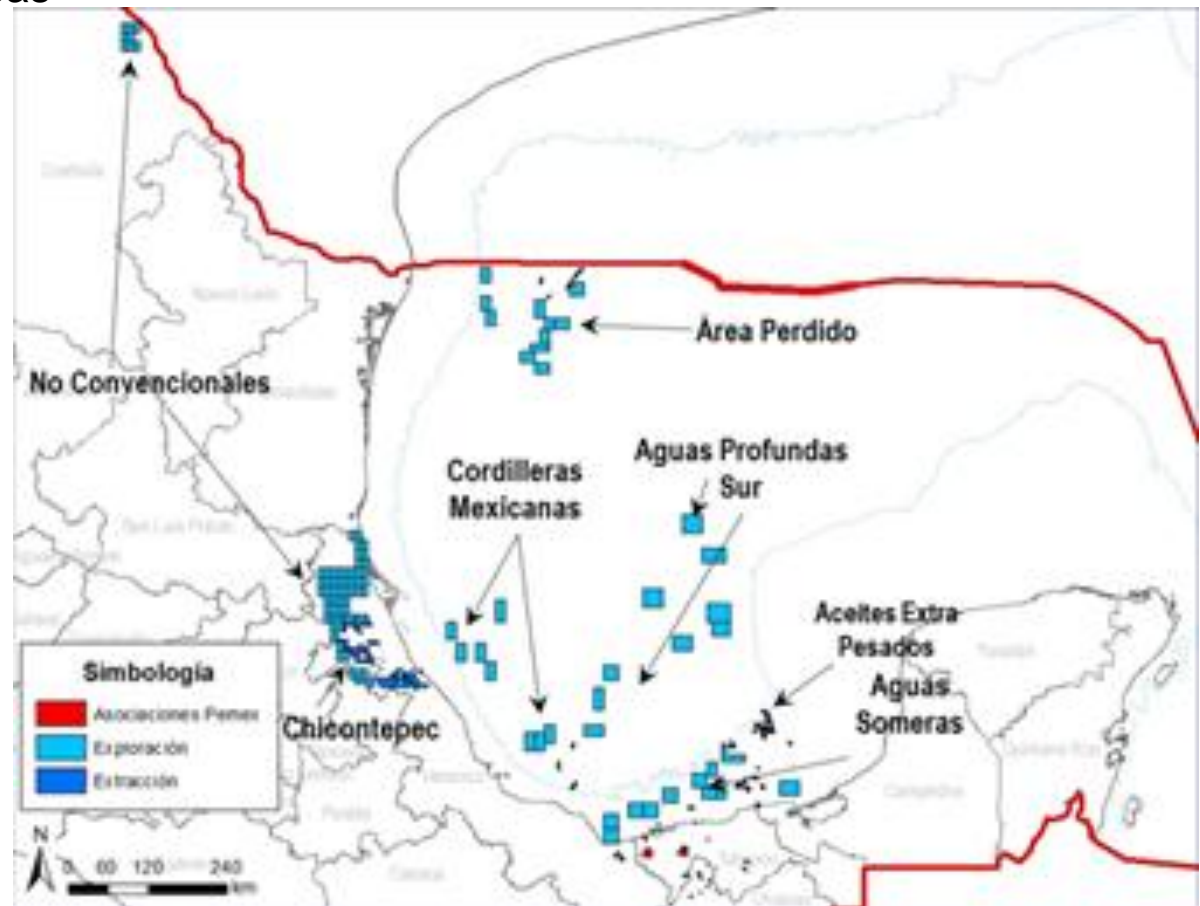
	Legislation	New Law/Amendment
1. Hydrocarbon Industry	Hydrocarbons Law	Replaces existing law
	Foreign Investment Law	Amendment
	Mining Law	Amendment
	Public Private Partnership Law	Amendment
2. Electric Industry	Electric Industry Law	New law
3. Geothermal Energy	Geothermic Energy Law	New law
	National Waters Law	Amendment
4. HSE	Law of the National Agency for Industrial Safety and Environmental Protection of the Hydrocarbon Sector	New law
5. PEMEX, CFE and SPEs	PEMEX Law	New law
	Federal Energy Commission Law (CFE Law)	New law
	Federal Act on Public Entities	Amendment
	Law of Procurement, Leasing and Services for the Public Sector	Amendment
	Public Works and Related Services Law	Amendment
6. Regulatory Agency and Civil Service	Law for the Regulatory Entities of the Energy Sector	New law
	Organic Law of the Public Administration	Amendment
7. Hydrocarbon Revenues	Income Receivable from Hydrocarbons Law	New law
	Federal Fees Law	Amendment
	Tax Coordination Law	Amendment
8. Mexican Oil Fund	Mexican Oil Fund for the Stabilization and Development Law	New law
9. Budget	Federal Budget and Treasury Accountability Law	Amendment
	General Public Debt Law	Amendment

## Notable Prospective Upstream Production



## Round 1 – Block Characteristics

- New exploration areas and extraction fields cover approximately 28,500 km<sup>2</sup>
  - 91% are exploration areas
  - 9% are producing fields





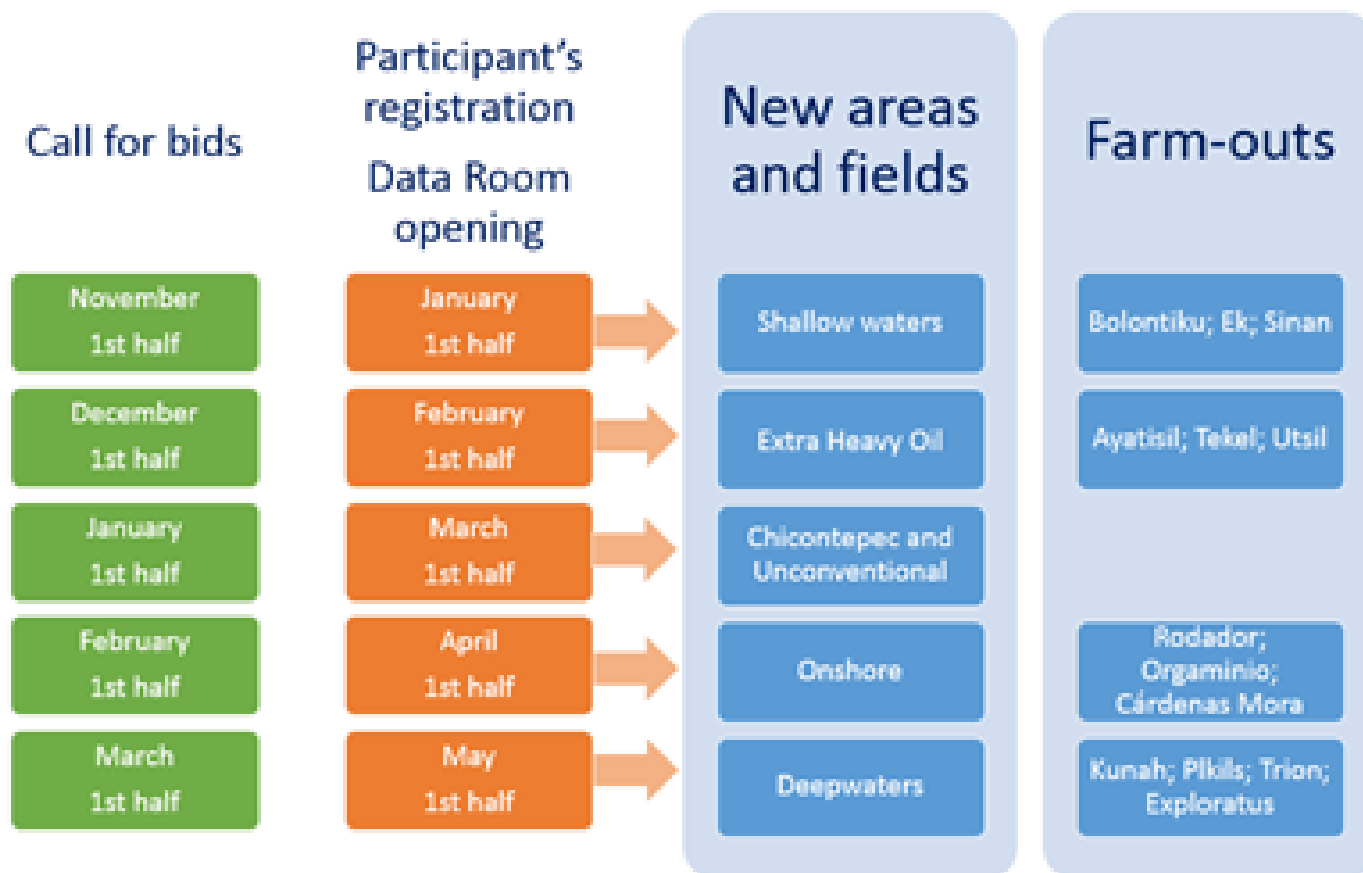
## Round 1 – Projected Investment

- 14 blocks under JVs with PEMEX
- 169 new blocks open to all bidders

Type of Project	Block Number	Surface KM	Volume Mmboe	4 Year Estimate MMUSD	Annual Estimate Investment MMUSD
Exploration (Prospective Resources)	109	25,903	14,606	19,000	4,750
Extraction (2P Reserves)	60	2,597	3,782	15,100	3,775
PEMEX's Farmouts (2P Reserves)	14 (in 10 contracts)	612	1,557	16,400	4,100
<b>Total</b>	<b>183</b>	<b>29,112</b>	<b>19,945</b>	<b>50,500</b>	<b>12,625</b>

## Round 1 Schedule

- This Round is divided into the following stages (although it is slightly behind schedule):



## Mexican Energy Reform: Power Sector Overview

- The Energy Reform drastically changes the country's current power generation policies:
  - Creation of new governmental entity -- "*Centro Nacional de Control de Energia*" (**CENACE**) – to manage operational control over electricity grid and to ensure open access to private parties
  - Creation of a wholesale energy market
  - Creation of a Clean Energy Certificate System
    - ❖ First Guidelines were issued on Oct 31, 2014
- Large Energy Consumers will have the option of purchasing energy from either (1) private power generators under PPAs or (2) the wholesale energy market
- Electricity distribution and transmission to remain under the control of the Mexican government through CFE

## Mexican Energy Reform: Power Sector Next Steps

### ■ Key features:

- The government must attempt to redefine renewable energy benefits permitted to private investors without dampening current enthusiasm within the market
- Rules for the proposed wholesale market must be defined

### ■ Challenges:

- Corporate and Industrial offtakers are taking a “wait and see” attitude before signing new power purchase agreements
- Renewable energy market participants must have confidence in the market restructuring in order to commit to making new investments

## Questions



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# United States Energy Exports

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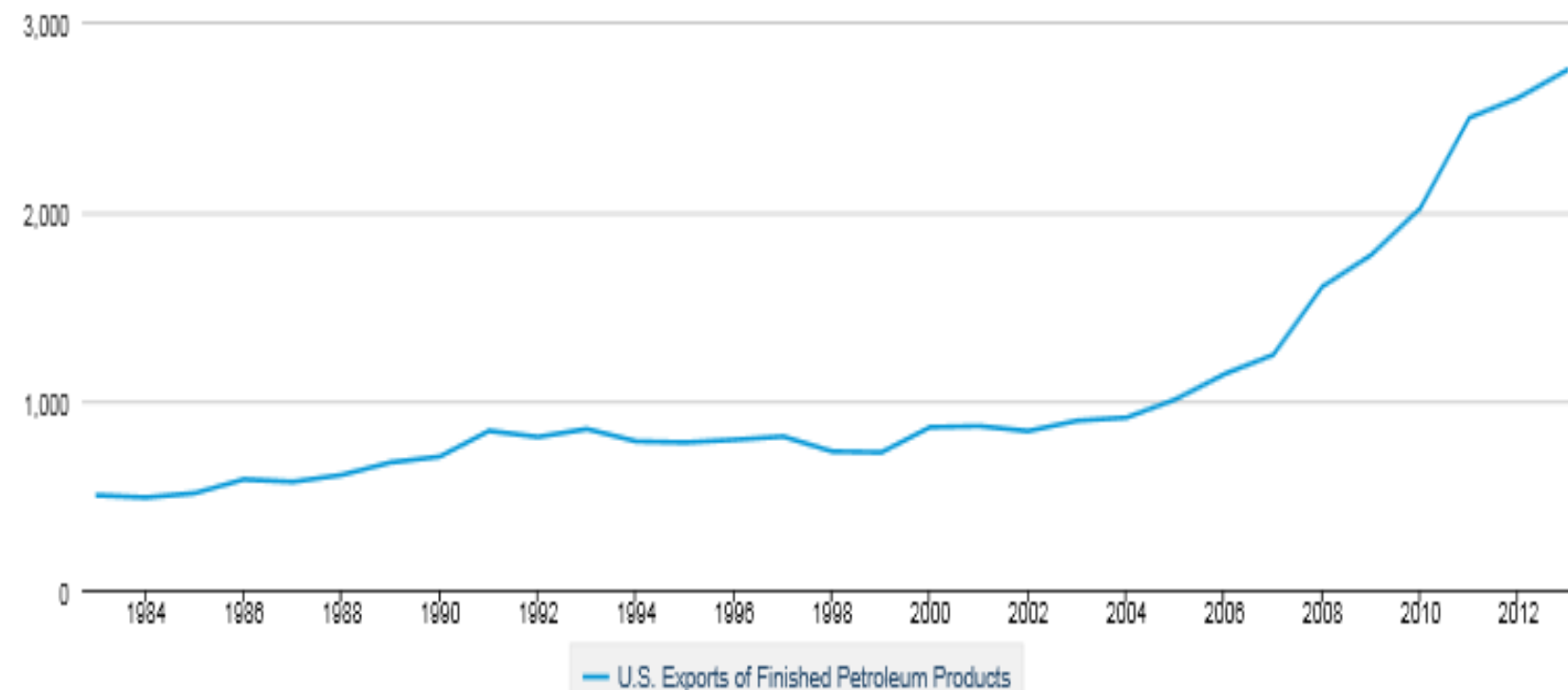
**Vera Neinast**

Senior Counsel, Energy Regulation, Markets and Enforcement

## Finished Petroleum Products Exported from the United States

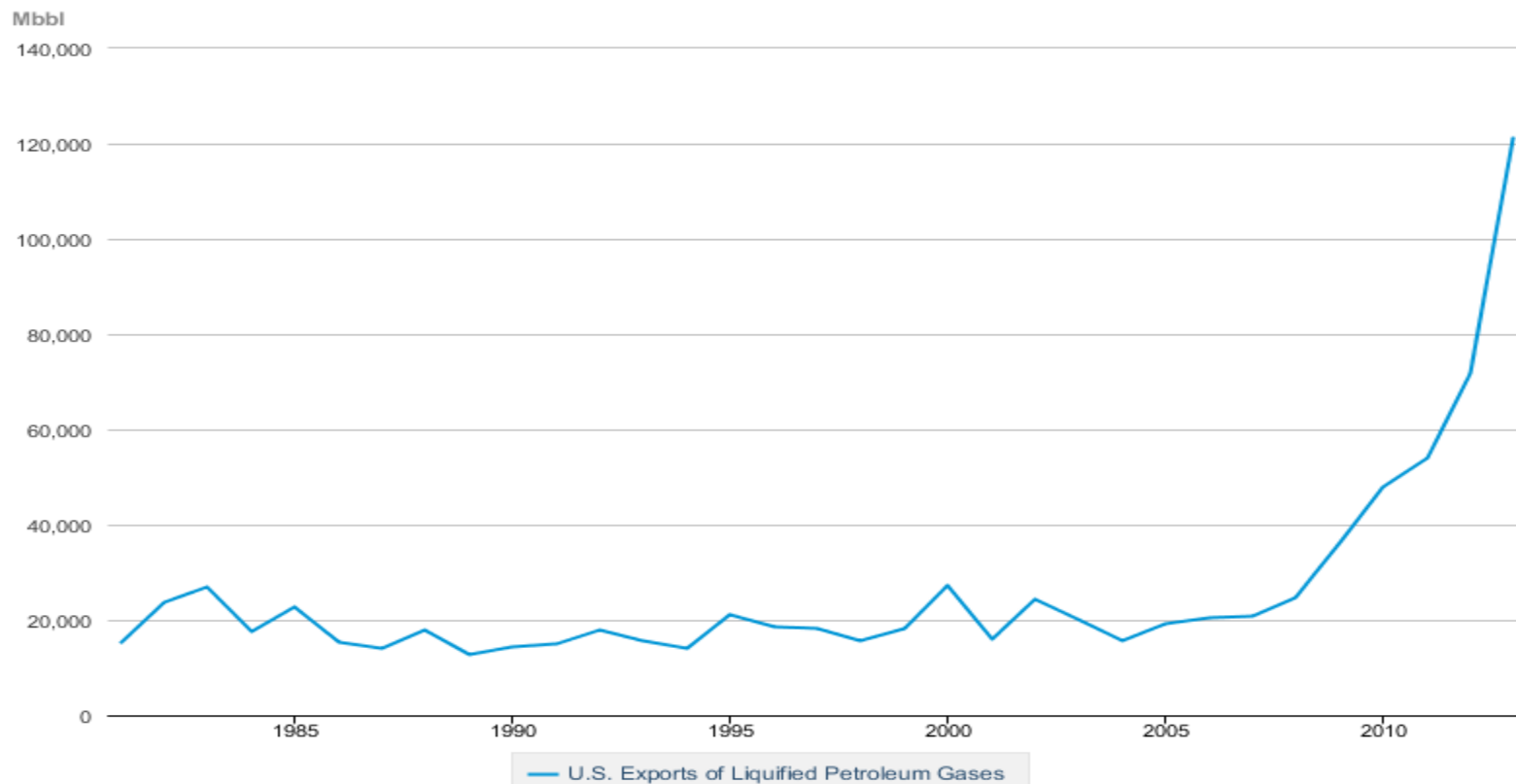
U.S. Exports of Finished Petroleum Products

Thousand Barrels per Day



 Source: U.S. Energy Information Administration

## Market Status – Liquefied Petroleum Gases (Ethane/Ethylene, Propane/Propylene, Butane/Butylene, Isobutane/Isobutylene) Exported from the United States



Source: U.S. Energy Information Administration

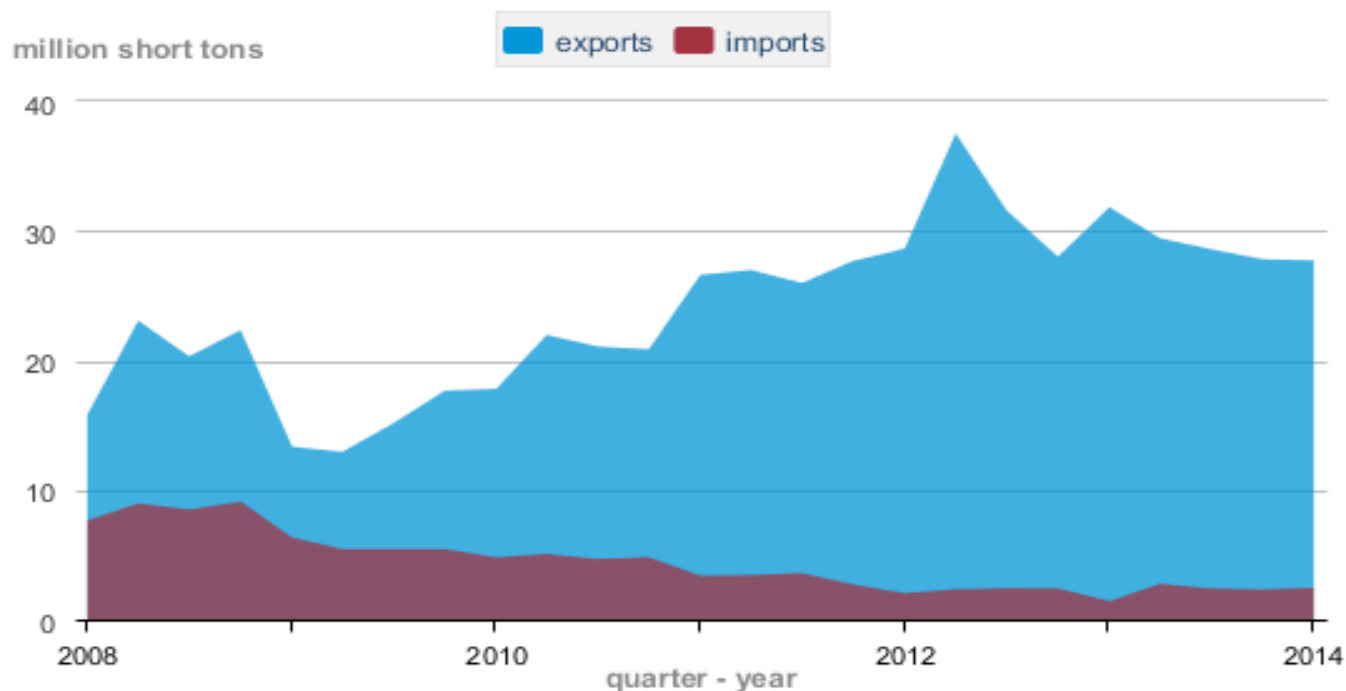


## Market Status – Coal Exported from the United States

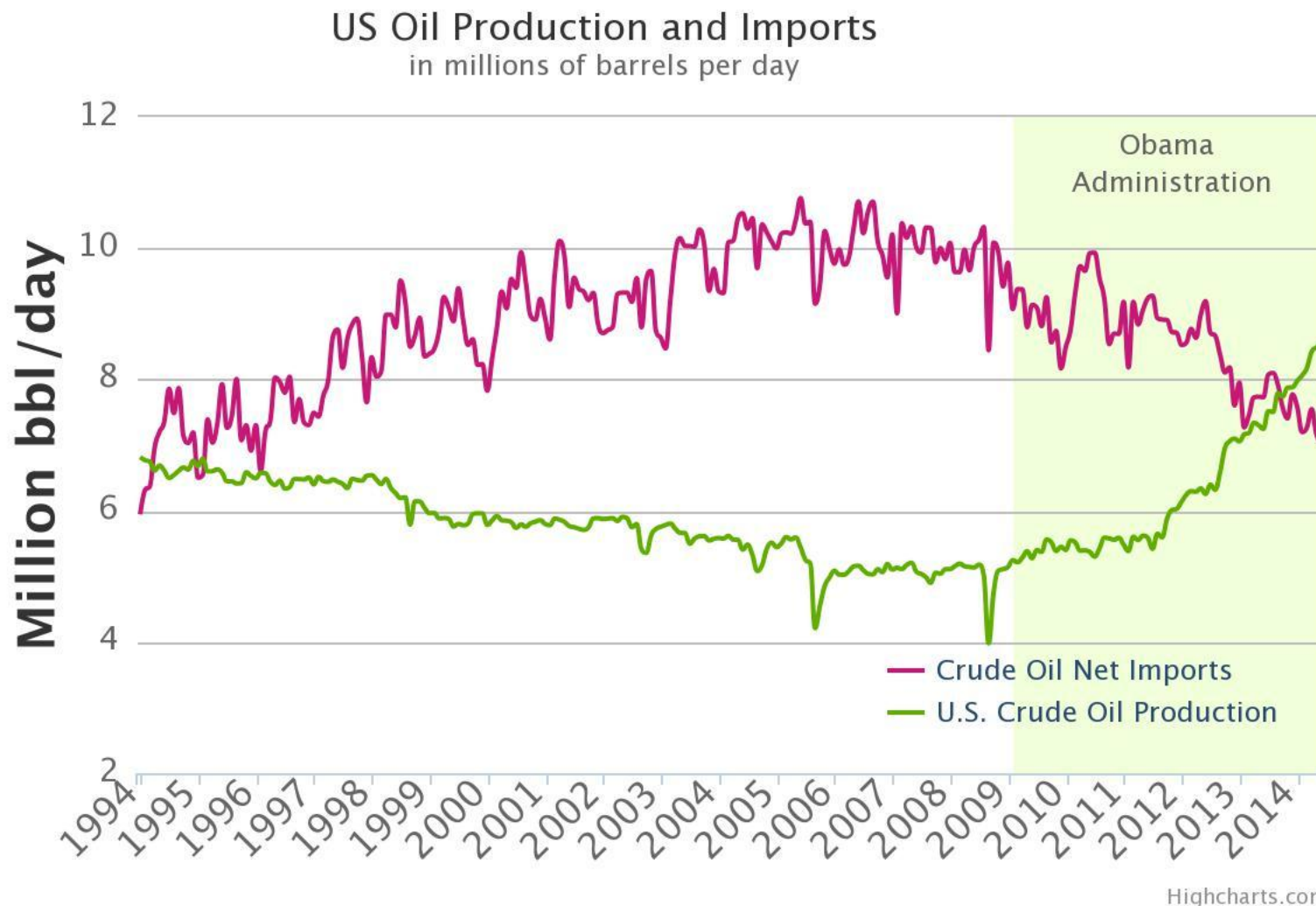
### ■ U.S. coal exports

- Exported more than 117 million short tons in 2013
- 2012: Exported at least 125 million short tons to 46 countries worldwide

#### U.S. coal exports and imports



## United States Oil Production and Imports

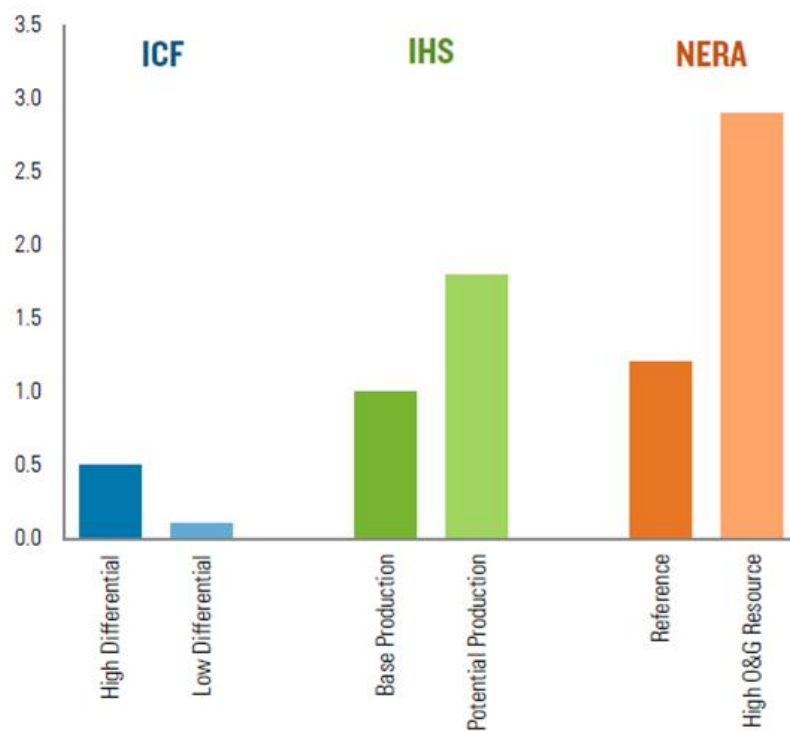


## The impact of lifting the crude export ban

Comparing ICF, IHS and NERA 2020 estimates

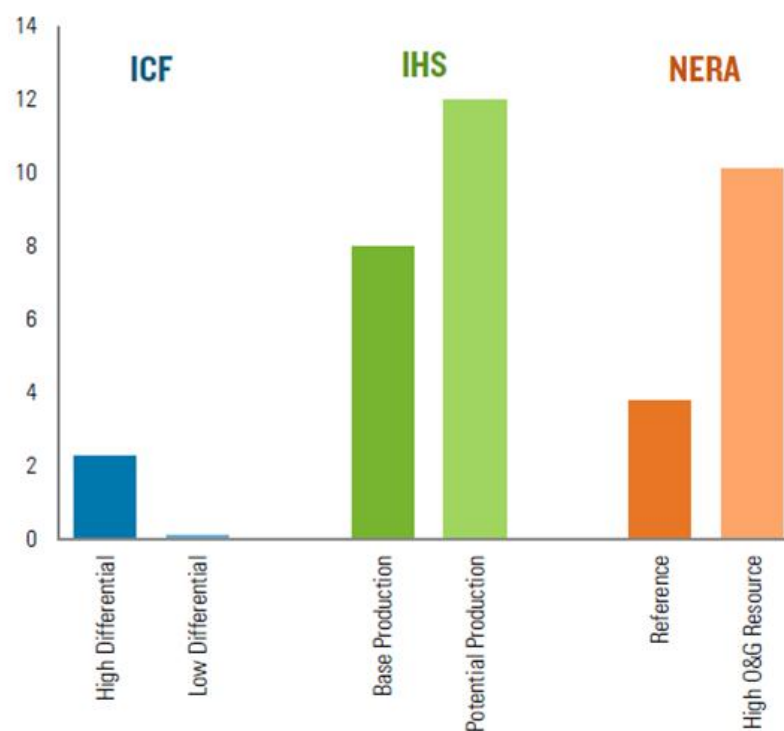
### INCREASE IN CRUDE PRODUCTION

Million barrels per day



### DECREASE IN GASOLINE PRICES

Cents per gallon



Source: ICF, NERA and IHS

## U.S. Crude Oil Exports: Overview of Export Restrictions

- Since the energy crisis of the 1970s, the export of crude oil from the United States has been subject to onerous restrictions.
- In particular, the Energy Policy and Conservation Act of 1975:
  - banned most U.S. crude oil and natural gas exports
  - *Exception:* unless President determines exports are consistent with national interest and statutory intent
- Department of Commerce, Bureau of Industry and Security (“BIS”) is responsible for administering these restrictions and the associated licensing through the Short Supply Controls of the Export Administration Regulations (“EAR”), 15 C.F.R. Part 754
- Refined petroleum products may be exported, so more have been exported as an alternative to exporting crude oil, subject to constraints of refinery capacity

## Exporting U.S. Crude Oil: Special Licenses and Statutory Exceptions

- Certain types of crude oil exports fit within prescribed categories for which BIS will approve export licenses:
  - Exports to Canada for consumption/use therein
  - Exports of crude oil produced in Alaska's Cook Inlet
  - Exports of certain California heavy crude ( $\leq 25,000$  bbl/d)
  - Exports of TAPS crude (under certain conditions)
  
- Export licenses may also be available if the export is consistent a presidential finding made under certain statutes:
  - Outer Continental Shelf Lands Act
  - Naval Petroleum Reserves Production Act of 1976
  - Energy Policy and Conservation Act of 1975
  - Mineral Leasing Act of 1920



## Exporting U.S. Crude Oil: Licenses for “Swaps”

- On a case-by-case basis, BIS will consider licenses for exports that it deems “consistent with the national interest and the purposes of the Energy Policy and Conservation Act.”
  
- As a matter of policy, BIS will only approve a “swap” under this authority that meets the following criteria:
  - Crude oil is being exchanged for an equal or greater quantity or quality foreign crude oil or refined product;
  - Contract may be terminated if U.S. petroleum supplies are interrupted/seriously threatened; **and**
  - Applicant can demonstrate that, for compelling economic or technological reasons that are beyond applicant’s control, the crude oil ***cannot be reasonably marketed*** in the United States.

## Current Developments: Lightly-Processed Crude Exported as “Petroleum Product”

- This past summer BIS issued commodity classification determinations (“CCATS”) to two energy companies (Pioneer and Enterprise) ruling that certain minimally-processed condensate constitutes a “petroleum product” and thus is not subject to the crude oil restrictions under the EAR.
  - “Lease condensate” is consider to be “crude oil” under the EAR.
  - However, BIS apparently determined that the condensate had passed through a “distillation tower” or functional equivalent (e.g., “splitter”) and was consequently transformed into a petroleum product.

“Crude Oil”	“Other Petroleum Products”
<p><b>Regulatory Definition:</b> “[A] mixture of hydrocarbons that existed in liquid phase in underground reservoirs and remains liquid at atmospheric pressure after <u>passing through surface separating facilities and which [have] not been processed through a crude oil distillation tower.</u>”</p>	<p><b>Informal Definition:</b> Sufficient processing through a distillation tower means that the liquid is no longer “crude oil.” <u>See also Supp. No. 1 to Part 754.</u></p> <p>There is NO detailed guidance on what degree of processing is required or the definition of “distillation tower”</p>
<p><b>Crude oil exports <u>always require</u> a license issued by BIS, unless an exception applies.</b></p>	<p><b>Exports of petroleum products are generally permissible without a license.</b></p>

## Other Current Developments

### ■ **BIS Expected to Clarify Rules for Crude Oil Exports:**

- BIS has not subsequently issued any other CCATS on processed crude oil
- BIS is expected to release guidance clarifying classification of crude oil v. petroleum product and licensing policy.

### ■ **Self-Classification of Condensate May Be the New Norm:**

- In light of BIS determinations, companies are exporting lightly-processed crude oil/condensate without formal classification rulings.
- In November 2014, BHP Billiton Ltd. apparently self-classified and contracted to sell 650,000 barrels of hydrocarbons to Vitol in Switzerland.



## Options for Obtaining Regulatory Guidance/Approval

### ■ Meet with the Agency

- Discuss concerns with Agency to understand how policy applies to Company's operations
  - Pro: identify potential avenues for business opportunities; obtain actionable; determine whether to pursue any of the options below.
  - Con: May not result in actionable guidance without further follow-up.

### ■ Obtain a Classification Request (CCATS)

- Confirm whether product is "crude oil" or "petroleum product" through regulatory filing requesting the export classification of an item under the Commerce Control List (CCL) within the EAR.
  - Pro: Provides definitive legal determination regarding export framework.
  - Con: BIS has been slow to act on these requests given the political debate surrounding the issue.

### ■ Request an Advisory Opinion

- Request BIS' interpretation of the EAR, including principles for determining the classification of CCL items.
  - Pro: Obtain generalized guidance, such as what constitutes a "distillation tower" for purposes of the EAR definition of "crude oil."
  - Con: non-binding; potential public disclosure of redacted Advisory Opinion; company must use the Advisory Opinion to self-classify.

## Options for Obtaining Regulatory Guidance/Approval

### ■ Make a Self-Determination

- Self-classify based on existing regulations and guidance (EAR does not require that companies obtain formal classifications or opinions from BIS).
  - Pro: Efficient path forward that is permissible under the EAR
  - Con: Company is legally responsible for the accuracy of self-determinations

### ■ Submit a License Request

- Request a license to authorize the export of crude oil
  - Pro: Allows companies to proceed with legal assurance.
  - Con: average processing time for BIS license request is one month but can be extended by a month or more due to political debate; unless prescribed category applies, it may be difficult to prove the product is not marketable in the US under the case-by-case analysis.

## Current Regulatory Framework – U.S. LNG Exports

- **Exports regulated by the U.S. Department of Energy through the Office of Fossil Energy (“OFE”)**
  - OFE administers the import and export of natural gas through its Administrative Procedures with Respect to the Import and Export of Natural Gas, 10 CFR Part 590
  - Exports are authorized unless determined “not consistent with the public interest”
  - All exports of LNG require approval by DOE
  - Exports to countries with which the U.S. has a free trade agreement (“FTA”) requiring national treatment for trade in natural gas are automatically deemed to be in the public interest
  - Exports to non-FTA countries are presumed to be in the public interest, but this presumption is rebuttable

## Current Developments – Processing of non-FTA Export Applications

- **New procedures issued August 15, 2014 applicable to processing of non-FTA export applications:** DOE will act upon LNG export applications to non-FTA countries in the order such applications complete the FERC or MARAD NEPA review process, and only after such process is completed
- **NEPA Review:** OFE conducts its own separate environmental analysis for export of the commodity, but based on the same NEPA documents prepared by FERC or MARAD for the export terminal
- **Practical Effects:**
  - Millions of dollars and significant resources must be invested to complete the NEPA process for the LNG terminal before DOE non-FTA process even begins for approval of LNG exports

## Current Developments – Change in Control

- **New procedures issued September 26, 2014 for change in control applications.** In September 2014 OFE announced new procedures applicable both to pending import/export applications and to authorizations already issued.
- **Change in control is broadly defined.** DOE construes a change in control to mean a direct or indirect change in the power to direct the management or policies of an entity
  - whether such power is exercised through one or more intermediary companies or pursuant to an agreement, written or oral
  - whether such power is established through ownership or voting of securities, or common directors, officers, or stockholders, or voting trusts, holding trusts, or debt holdings, or contract, or any other direct or indirect means
  - applies to both asset sales as well as stock transfers (unlike FERC)
- **Low threshold.** A rebuttable presumption that control exists will arise from acquisition of a 10% interest in the entity, or the ownership or the power to vote, directly or indirectly, 10% or more of the voting securities of the entity.

## Current Developments – Change in Control

- **Timing:** Entities must file a notice of change in control no later than 30 days after such changes have been effectuated, unless good cause is shown for a later filing.
- **Application of new policy:**
  - *Pending non-FTA export applications* – OFE will give immediate effect to the change but will provide a 15 day period for comments. Opponents have to demonstrate that the change renders the underlying application inconsistent with the public interest. OFE will address issues raised in its final order on the pending application.
  - *Final non-FTA export authorizations* – OFE will give effect to the change and publish notice in the Federal Register. Opponents will have 15 days from the date of publication to submit comments. If protests are filed, then OFE will issue an order on the application. If no protests are filed, then the amendment is deemed granted 30 days after publication in the Federal Register.
  - *Pending FTA long-term import/export applications, pending non-FTA long-term LNG import applications, issued FTA long-term import/export authorizations and issued non-FTA long-term import authorizations* – OFE will give immediate effect to the amendment and take no further action.

## Current Developments – Change in Control

### ■ Impact of new policy:

- DOE considers a change in control to be a change in material facts or conditions upon which the proposal is based, therefore a filing is mandatory
- No way to avoid having to make a filing with OFE by structuring the change in control as a stock purchase instead of an asset purchase (*cf.* FERC)
- Broad reach and low threshold limit of 10% has the potential to cause an applicant to have to make multiple change in control filings
- Broad reach could include contractual control, *e.g.*, by a customer
- Provides protesters with another means to challenge the application

## Questions



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