



SENT TO COUNCIL

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Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Betsy Shotwell

SUBJECT: SEE BELOW

DATE: June 21, 2011

Approved:

Date:

6/21/11

**SUBJECT: STATUS AND FORECAST OF NOTABLE FEDERAL LEGISLATION
RELEVANT TO LOCAL GOVERNMENT INTERESTS**

INFORMATION

The City's Federal lobbyist firm of Patton Boggs LLP has provided the attached status report of the 112th Congress. The report describes in detail the status of high-profile federal legislation of interest to the City and anticipated activities in Congress prior to their August recess scheduled to begin on August 6.

The report references the status of the FY 2012 budget and appropriations including debt reduction negotiations, the Federal Aviation Administration, transportation/SAFETEA-LU, Economic Development Administration reauthorizations, chemical security, the Clean Water Act, climate change/energy legislation, telecommunications including public safety interoperability/D Block Spectrum allocation and the Municipal Bond Market Support Act of 2011.

This information and analysis continues to assist and support the City's advocacy in Washington, D. C.

BETSY SHOTWELL
Director, Intergovernmental Relations

Attachment:

Patton Boggs, LLP memorandum, "Status and Forecast of Notable Federal Legislation Relevant to Local Government Interests."

MEMORANDUM

To: City of San Jose
From: Patton Boggs LLP
Date: June 17, 2011
Subject: Status and Forecast of Notable Federal Legislation Relevant to Local Government Interests

This memorandum provides a comprehensive update on the status and prospects of pending, high-profile federal legislation of particular relevance to local governments. Specifically, the memo addresses –

- FY2012 Budget and Appropriations
- Transportation / SAFETEA-LU Reauthorization
- Federal Aviation Administration Reauthorization
- Disaster Mitigation Legislation
- Chemical Security
- Clean Water Act
- Climate / Energy Legislation
- Telecommunications
- Municipal Bonds
- Repeal of Three Percent Withhold IRS Provision
- Economic Development Administration Reauthorization

FY2012 Budget and Appropriations

FY2012 House 302(b) Allocations

In May the House established its FY2012 302(b) allocations, which limit the total spending on each of the 12 appropriations bills. Using the overall spending cap of \$1.019 trillion (based on the budget passed by the House in April), the allocations for each FY2012 appropriations bills were set as follows --

- Agriculture: \$17.3 billion (13% less than FY2011)
- Commerce: Justice-Science: \$50.2 billion (6% less than FY2011)
- Defense: \$530 billion (3% more than FY2011)
- Energy & Water: \$30.6 billion (3% less than FY2011)
- Financial Services: \$19.9 billion (9% less than FY2011)
- Homeland Security: \$40.6 billion (3% less than FY2011)
- Interior-Environment: \$27.5 billion (7% less than FY2011)
- Labor-HHS-Education: \$139.2 billion (12% less than FY2011)
- Leg Branch: \$4.3 billion
- MilCon-VA: \$72.5 billion
- State-Foreign Operations: \$39.6 billion (18% less than FY2011)
- Transportation-Housing: \$47.7 billion (14% less than FY2011)

Overall, the FY2012 discretionary spending cap reflects a \$30.4 billion reduction from FY2011 spending (\$70 billion below FY2010) and is \$121 billion less than the President's FY2012 Budget request submitted in February.

FY2012 House Appropriations Action

The House passed three of its FY2012 appropriations bills – Homeland Security (H.R. 2017) on June 2; Military Construction-Veterans Affairs (H.R. 2055) on June 14; and Agriculture (H.R. 2112) today, June 16.

The Defense and Energy & Water bills will be up on the House floor next, as both were approved by the full Appropriations Committee this week (Defense on June 14 and Energy & Water on June 15). The Energy & Water bill is tentative scheduled to be on the House floor the week of July 4. The Financial Services and Legislative Branch Subcommittees will likely approve their FY2012 appropriations bills today, which will place them on the full committee schedule next week and the House floor shortly thereafter.

The remaining FY2012 bills are scheduled for subcommittee action throughout July with House leaders still intending to pass as many bills as possible prior to the August recess scheduled to begin on August 6. While the process has been relatively smooth thus far, it is expected to get more

difficult as the bigger and more contentious bills are addressed. The summer markup schedule (subcommittee / committee) is as follows --

- Interior-Environment (July 6 / July 7)
- Commerce-Justice-Science (July 7 / July 13)
- Transportation-Housing (July 14 / July 26)
- Labor-HHS-Education (July 26 / August 2)
- State-Foreign Operations (July 27 / August 3)

The Military Construction-Veterans Affairs House vote established a procedure, proposed by House Speaker John Boehner (R-OH) prior to the November 2010 elections, to allow separate votes on each title of an appropriations bill (generally each title encompasses one federal department or independent agency). This did not present any problems for passage of either the Military Construction or Veterans Affairs programs, but may prove to be an obstacle for other bills. Moreover, it is unclear what would happen if the House voted to divide a spending bill by removing or zeroing out funding for a department or agency. This would create legislative complications and impose additional burdens on conference negotiators.

Department of Homeland Security Appropriations

To recap some of the highlights of the debate and final House bill –

Urban Area Security Initiative (UASI)

As approved by the Appropriations Committee, the House FY2012 Homeland Security Appropriations bill included language to limit the number of designated Urban Area Security Initiative (UASI) areas to 10.

Prior to the committee vote, Patton Boggs coordinated an effort among impacted localities and facilitated the delivery of a letter signed by 25 elected officials to House appropriators. Once the bill was reported out of the committee, we worked with various Congressional delegations to draft and secure bi-partisan support for an amendment to strike the language when the bill reached the House floor.

These efforts were successful and an amendment to strike the cap passed by a vote of 273-150.

Advocacy efforts are now focused on the Senate in an effort to sustain funding for the program and treat it as a stand-alone program and not part of the State and Local Program allocation. While the timing of Senate action on the bill is uncertain, we are again working with the local coalition to send a letter to Senate appropriators and garner Member support.

FEMA State and Local Programs

The House funds FEMA State and Local Programs at approximately \$1 billion, a \$1.2 billion decrease from FY2011. The committee attributes this reduction to the lack of grant accountability and evaluation at the agency, as well as nearly \$13 billion in unobligated appropriations dating back to FY2005.

State and Local Program funding is to be distributed at the discretion of the Secretary for the programs listed below, several of which were previously appropriated as separate program line items with specific amounts identified, such as UASI funding. However, out of the \$1 billion, \$193 million is directed to National Programs and \$55 million is directed to Operation Stonegarden. This leaves approximately \$800 million in total for the following:

- State Homeland Security Grant Program (SHSGP) (\$527 million in FY2011)
- UASI (\$662 million in FY2011)
- Metropolitan Medical Response System (MMRS) (\$35 million in FY2011)
- Citizen Corps Program (\$10 million in FY2011)
- Public Transportation Security Assistance and Railroad Security Assistance
- Over-the-Road Bus Security Assistance
- Port Security Grants (\$250 million in FY2011)
- Driver's Licenses Security Grants (\$45 million in FY2011)
- Interoperable Emergency Communications

Twenty-five percent of SHSGP and UASI funds are to be used for Law Enforcement Terrorism Prevention activities. The committee also provides that the installation of communications towers is not considered construction of a building or other physical facility under the eligibility requirements of SHSGP or UASI.

Other funding highlights –

- Firefighter Assistance Grants: \$670 million for SAFER and FIRE Act grants (\$405 million each in FY2011) ** The committee proposed only \$350 million for these grants. A successful amendment offered by Representative Steve LaTourette (R-OH) and Bill Pascrell (D-NJ) added \$320 million during floor debate. Another amendment offered by Representative David Price (D-NC) to maintain the retention / rehiring eligibility for SAFER was also adopted by the House.
- Emergency Management Performance Grants (EMPG): \$350 million (\$340 million in FY2011) ** The committee also directs an emphasis on all-hazards activities and the inclusion of personnel expenses and Emergency Operations Centers as eligible uses of EMPG funding.
- National Predisaster Mitigation: \$40 million (\$50 million in FY2011)
- Emergency Food and Shelter: \$120 million (\$120 million in FY2011)

The bill also identifies three reforms for the State and Local Program:

- Reorganize the State and Local Grant Program so that funds are allocated at the discretion of the Secretary and directed towards areas with the highest need and greatest risk.
- Submit a plan with 60 days of enactment to drawdown all unexpended balances by the end of FY2012 of State and Local Program funds appropriated prior to FY2008.

- Withhold 50% of funding for the Office of the Secretary and Executive Management until the submission of the National Preparedness Goal and National Preparedness System, consistent with the recently-signed Presidential Policy Directive-8:

During committee consideration of the bill, an amendment proposed by Chairman Robert Aderholt (R-AL) to add \$1 billion for disaster funding was adopted. The funding was offset with a rescission of \$1.5 billion of unspent stimulus funds from the Department of Energy's Electric Vehicle program. The House also adopted an amendment proposed by Representative Ed Royce (R-CA) to reallocate \$1 million to the Immigration and Customs Enforcement (ICE) 287(g) training program.

Senator Mary Landrieu (D-LA), Chairwoman of the Senate Homeland Security Appropriations Subcommittee has been very vocal in her disappointment over the House version of the bill and promises a "showdown" over policy and funding when the bill is taken up in the Senate.

Department of Energy and Water Appropriations

As noted above, the House Appropriations Committee approved the FY2012 Energy & Water spending bill on June 15. In addition to the Department of Energy and Bureau of Reclamation, the bill funds the Army Corps of Engineers.

During the committee markup, an amendment offered by subcommittee Chairman Rodney Frelinghuysen (R-NJ) to provide an additional \$1 billion in emergency funding to the Corps of Engineers to address projects related to the recent flood disasters along the Mississippi and Missouri Rivers was adopted. The funding was offset by a rescission of unobligated stimulus funding for High Speed Rail projects. An amendment offered by subcommittee Ranking Member Peter Visclosky (D-IL) to strike the offset (as not being necessary for emergency funding) was rejected.

Debt Reduction Negotiations Impact on Senate Budget Resolution and Appropriations

During the week of May 23, the Senate held four procedural budget votes, all of which failed: (1) the House Republican budget was rejected 40-57, with five Republican Senators joining Democrats in opposing the measure – Scott Brown (R-MA); Susan Collins (R-ME); Olympia Snowe (R-ME); Lisa Murkowski (R-AK); and Rand Paul (R-KY). Senators Pat Roberts (R-KS), Kay Bailey Hutchison (R-TX), and Charles Schumer (D-NY) did not vote; (2) President Obama's FY2012 Budget proposal was rejected unanimously 0-97; (3) Senator Paul's aggressive proposal to balance the budget in five years, including the elimination of the Commerce, Education, Energy and Housing and Urban Development Departments, failed 7 -90; and (4) the proposal by Senator Patrick Toomey (R-PA) to balance the budget in nine years was rejected 42-55.

As a symbolic gesture, on May 31 the House overwhelmingly rejected (318-97) a proposal to raise the debt limit without also cutting federal spending levels. A similar proposal has been offered as an amendment to the Economic Development Administration Reauthorization in the Senate and, if it reaches a vote, is expected to yield a similar result.

Senate Budget Committee Chairman Kent Conrad (D-ND) continues to delay release of a Senate Budget Resolution, though has recently expressed progress in his efforts to draft a resolution that

will secure enough support to pass the committee. His initial proposal to reduce the deficit by \$4 trillion over 10 years, including tax reform measures to produce \$1 trillion in new revenue, was opposed by his committee colleague Senator Bernie Sanders (I-VT) because he felt it cut too far into programs that benefit the underserved populations. Chairman Conrad has said the committee markup of the resolution would be deferred pending debt reduction negotiations, conceding that FY2012 budget reductions may be part of a compromise agreement.

To that end, the bi-partisan deficit reduction panel proposed by the President, the “Biden Group,” met several times throughout May and early June and is scheduled to meet three times this week in an effort to present an agreement to Congressional leaders by July 4 – and in advance of a scheduled golf outing on June 18 for President Obama and House Speaker John Boehner (R-OH). Adding to the pressure to reach a deal, several credit rating companies issued warnings that the U.S. rating may be downgraded to *negative* unless significant progress in the negotiations is made by mid-July.

The Department of Treasury has set August 2 as the deadline for which the \$14.3 trillion debt ceiling must be raised. It is unclear how the group will resolve party-line differences over revenue and entitlement savings in order to reach a long-term agreement. Republicans stated the debt limit must be raised by at least \$2.4 trillion through 2012 and are calling for spending cuts to match or exceed this figure, without the use of tax increases, which Democrats insist must be part of a negotiated deal.

The other deficit reduction group, the “Gang of Six,” which now formally includes only five Senators after Tom Coburn (R-OK) became frustrated with the group’s lack of progress and decided to take a break from negotiations, continues to work on a long-term plan. The remaining members – Senators Dick Durbin (D-IL), Kent Conrad (D-ND), Mark Warner (D-VA), Mike Crapo (R-ID), and Saxby Chambliss (R-GA) recently briefed 20 Democratic and Republican Senators on their plan which would reduce deficits by at least \$4.7 billion over 10 years and include spending cuts, revenue increases, and entitlement changes.

On June 15, the House Judiciary Committee approved a joint resolution (H J Res 1) proposing a balanced-budget amendment to the Constitution which would require a two-thirds vote of each chamber to run a deficit, increase revenue, or raise the debt limit. It would also cap federal spending at 18 percent of gross domestic product.

Therefore, we don’t expect any substantive movement in the Senate on an FY2012 budget resolution or appropriations bills until after July 4, as the Senate waits to see if the deficit reduction negotiations produce results.

Transportation / SAFETEA-LU Reauthorization

FY2011 Discretionary Funding

Transportation Investment Generating Economic Recovery (TIGER): The FY2011 Continuing Resolution (CR) included \$527 million for the TIGER program. The Notice of Funding Availability (NOFA) is expected in late-June or July. Project guidelines for the third round of TIGER or "TIGER III" are expected to be nearly identical to TIGER II, with the exclusion of planning grant funding.

Transit Investments for Greenhouse Gas and Energy Reduction (TIGGER): The FY2011 CR included \$50 million for transit energy efficiency grants. Program criteria will not change significantly in the next round of funding for which a NOFA is expected in late-June.

Federal Highway Discretionary Funding: The Federal Highway Administration (FHWA) released NOFAs for 11 grant programs on May 8 totaling an estimated \$430 million in funding (the application deadline was June 3). These grants will support projects that work to improve safety, maintain a state of good repair, and make communities more livable. With the exception of the Transportation, Community, and System Preservation program, application eligibility was limited to States (requiring locals to first submit applications at the State level).

Programs included in the NOFA --

- Delta Region Transportation Development
- Ferry Boat
- Highways for LIFE
- Innovative Bridge Research and Deployment
- Interstate Maintenance
- National Historic Covered Bridge Preservation
- National Scenic Byways
- Public Lands Highways
- Rail Highway Crossing Hazard Elimination in High Speed Rail Corridors
- Transportation, Community, and System Preservation (TCSP)
- Truck Parking Facilities

Additional Federal Transit Administration Funding Opportunities: The Federal Transit Administration (FTA) is expected to roll out FY2011 grant solicitations for the Alternative Analysis, Over-the-Road Bus, and Bus and Bus Facilities programs in late June or July. Drastic changes in eligibility are not likely and funding for authorized programs is maintained at 2009 levels. Given the actions by FHWA, a short application window is anticipated. Interested applicants are encouraged to prepare their applications based on last year's funding in advance of the formal solicitations.

SAFETEA-LU Reauthorization

The House and Senate authorizing committees continue to draft reauthorization legislation. On May 25, Chairman Barbara Boxer (D-CA) and three of her colleagues from the Senate Environment and Public Works Committee released a statement indicating they had made great progress on a highway bill that would include funding at base-line levels. It now appears that the committee is getting closer to introducing the highway portion of a surface transportation reauthorization bill. However, some gaps remain on issues such as funding totals, financing and distribution of formulas. These unaddressed issues could result in draft legislation that contains many blank spaces.

While no formal statement has been released by the House Transportation and Infrastructure Committee, Chairman John Mica (R-FL) may introduce the House version of the bill in the coming weeks. Some are questioning if Chairman Mica can hold true to the initial timeframe he proposed since Republican leaders in the House have yet to guarantee floor time for the bill.

Without the introduction of a bill and no agreed-upon solution to the revenue issues facing the Highway Trust Fund (HTF), the likelihood of a five-year bill is diminishing. Discussions of a two-year bill within current HTF levels are escalating despite Mica's strong opposition to a short-term bill. Regardless of unresolved policy issues and the lack of a solid timeframe, the authorizing committees are likely to accelerate their work on the reauthorization of SAFETEA-LU in the upcoming weeks.

In May, a draft of the Administration's blueprint for reauthorization was released. The draft closely reflects the proposal the President included in his FY2012 budget request for the Department of Transportation. A detailed report was provided shortly after the release, but to recap some of the highlights --

- Transit New Starts. The proposal makes significant changes designed to streamline and expedite the New Starts process. It eliminates Small Starts as a separate category as project development for all projects is substantially streamlined. Instead, the process for all projects is streamlined to two phases: Project Development (which consolidates Preliminary Engineering and Final Design) and Construction. The evaluation criteria are also reformed, with the project justification rating now designed as a simplified/streamlined consideration of "transportation effects, environmental effects, economic development effects, and comparison of project effects to cost." As a result, cost effectiveness now explicitly includes more than just travel time savings and is a comprehensive measure of benefits and costs. The bill also makes a Program of Interrelated Projects eligible under the New Starts program.
- State of Good Repair Formula Program. The bill ends the current Fixed Guideway Modernization formula and discretionary Bus and Bus Facilities program and replaces them with a single State of Good Repair (SGR) formula program. The section-by-section notes that "FTA has not yet developed distribution formulas and expects to work with Congress on the formula." The bill includes a specific set-aside for buses, although the dollar amount is not provided.

- Urbanized Area Formula Grants. The bill increases flexibility to use funds for operating assistance in “temporary and targeted” instances based on economic conditions.
- Greenhouse Gas and Energy Reduction Programs. The bill effectively repeals the Clean Fuels Program and replaces it with a new program that includes research and competitive deployment and demonstration grants. It continues a TIGGER-like program. It creates a new Clean and Energy Efficient Public Transportation Research Program for nationally significant research, development and demonstration projects. It also establishes a Public Transportation Test Beds Demonstration Program to demonstrate and evaluate innovative technologies at public transportation agencies.
- Livability Demonstration Grants Program. The bill establishes a competitive program for planning and capital projects to demonstrate innovative livability projects that better integrate transit facilities and service into the community, including the development of underdeveloped transit stations and surrounding areas. Eligible activities include station area planning, real estate acquisition, streetscaping, pedestrian and bike facilities and intermodal facilities, among others. Projects are to be evaluated based on the livability principles that have been articulated through the Sustainable Communities Partnership.
- JARC, New Freedom and Other Specialized Grant Programs. The bill creates a new Consolidated Specialized Transportation Grant Program that combines the Section 5310 program (Elderly and Disabled Formula Program), Job Access and Reverse Commute (JARC) and New Freedom programs. States or eligible recipients under Section 5307 are the eligible recipients under this program and may sub-grant to public entities, “operators of public transportation” and nonprofit organizations.
- Rural Transit Formula Program (Section 5311). The bill makes planning and project administration an eligible use of Section 5311 funds. The formula is otherwise continued as it stands, with the exception that the Tribal Transit takedown is eliminated and made its own program.
- Technical Assistance and Workforce Development. The bill consolidates the National Research Programs, National Transit Institute and Human Resource Programs into one program. It establishes a Workforce Development Program to “develop, implement and manage a national transit workforce development program to meet the human resource needs of the public transportation industry.” It will fund innovative workforce development models for public transportation throughout the country. Funding for workforce development begins at \$5 million in FY2012 and increases annually to \$10 million in FY2017.
- University Transportation Centers. The bill transforms the University Transportation Center program. Nonprofit universities must join together to form consortia of at least two universities to compete for funding. The Department of Transportation will make 20 grants of \$4,000,000 to each consortia, with \$80 million available per year over the period of the reauthorization. There is a required 100 percent match. The bill makes available an additional \$20 million per year for targeted, high-priority multi-modal research grants. These grants will be open to any university participating in a research consortium. The purpose is to have a mechanism for the Department to leverage university resources to address specific cross-

modal research priorities in the areas of safety, state of good repair, economic competitiveness, environmental sustainability and livable communities.

National Infrastructure Bank

The joint statement from Senate Environment and Public Works Committee Chairwoman Barbara Boxer (D-CA) and Ranking Member James Inhofe (R-OK) calls for increasing Transportation Infrastructure Finance and Innovation Act (TIFIA) program funding from the currently authorized level of \$122 million to \$1 billion annually. This proposed dramatic expansion of TIFIA makes it less likely that a Senate reauthorization bill will include a separate National Infrastructure Bank. Chairwoman Boxer has consistently indicated a preference for expanding TIFIA over creating a new Infrastructure Bank structure. The House surface transportation reauthorization bill is not expected to include any provisions for a National Infrastructure Bank. House Transportation and Infrastructure Committee Chairman John Mica (R-FL) supports increasing TIFIA funding, one of the core areas of agreement between Chairman Mica and Chairwoman Boxer. It should be noted, however, that the Senate Commerce Committee has jurisdiction over a bank title, and Chairman Jay Rockefeller (D-WV) and Senator Frank Lautenberg (D-NJ) have released draft legislation modeled after the Administration's proposal for a National Infrastructure Innovation and Finance Fund.

The Senate infrastructure bank proposal that has received the most attention, Senator John Kerry's (D-MA) *Building and Upgrading Infrastructure for Long-Term Development* (S. 652), the BUILD Act, would be broader than transportation infrastructure and focus also on energy and water projects. As such, it would be created outside of the surface transportation reauthorization. However, the consensus around increasing TIFIA is generally seen to militate against the creation of a separate - even if broader - National Infrastructure Bank.

Federal Aviation Administration (FAA) Reauthorization

As previously reported, both the House and Senate passed an FAA reauthorization bill (H.R. 658 and S. 223), setting up a House-Senate conference. Although the Senate has appointed conferees, the House has not yet done so. That has not prevented the House and Senate committee staffs from meeting over the past two months to iron out differences between the bills, reserving a handful of issues for a decision by the Members.

Because a compromise bill has yet to emerge, Congress was required to extend FAA programs for the 19th time, giving itself until June 30 to get the job done. Prospects for a compromise bill by June 30 are highly uncertain, as the conferees have not resolved an impasse over a provision in the House bill that would overturn a National Mediation Board (NMB) rule that changes the way votes to certify a union are counted. This provision is every bit as divisive as the so-called FedEx provision included in the House-passed bill in the previous Congress.

Other differences between the House and Senate bills, such as Airport Improvement Program funding levels, the future of the Essential Air Service program, how many additional beyond-the-perimeter non-stop flights to and from Reagan National Airport, and the Passenger Facility Charge (PFC) maximum also remain unresolved, though are not as contentious as the NMB debate. For example, while there remains a strong push from the airport trade associations to include a provision

that increases the PFC maximum, a desire shared to some extent by some members of the Democratic caucus and the Obama Administration, there does not appear to be any movement in this direction in the conference discussions to date, most likely because of the absence of Republican support.

Disaster Mitigation Legislation

In response to the recent wave of tornadoes and floods, and in anticipation of an active hurricane season, several Members of the Florida Congressional delegation introduced legislation designed to enable States and local governments to better prepare for the impact of such disasters.

The *Hurricane and Tornado Mitigation Investment Act of 2011* (H.R. 2067) would provide a 25% tax credit for mitigation costs up to \$5000 / year. This is specifically intended to encourage infrastructure improvements as protective measures against hurricanes and tornadoes. The bill was introduced on June 1 by Representative Gus Bilirakis (R-FL) and currently has the support of seven of his Republican colleagues in the Florida delegation, including Mario Diaz-Balart (R-FL) who simultaneously introduced the *Safe Building Code Incentive Act of 2011*. This measure would provide additional disaster relief funding to States that enact building codes designed to strengthen infrastructure as part of their disaster preparation plans.

Additionally, several Senators representing recently-impacted States are drafting a tax relief bill modeled after the *Heartland Disaster Tax Relief Act of 2008* which made several changes to the tax code to help individuals and businesses impacted by several Midwestern Disasters between May and July 2008.

Chemical Security

The House-passed FY2012 Homeland Security appropriations bill (H.R. 2017) includes a one-year extension of the Chemical Facility Anti-Terrorism Standards (CFATS) program to October 4, 2012 – that would not extend to water facilities. The accompanying Committee Report includes two instructional directives for the Department of Homeland Security:

- To study and report back on findings regarding the use of “Inherently Safer Technologies” (IST). That report is to detail the Department’s definition of IST, the associated costs to implement and oversee statutory or regulatory requirements, the financial and economic costs to facilities required to implement any such requirements, and a detail of unintended consequences of implementing IST related to security and effects on other Federal agencies.
- To expedite publication of its Final Rule for ammonium nitrate regulations and to provide an immediate briefing on the anticipated timeline for full implementation of the program, as previously authorized.

As various Congressional Committees continue consideration of several different chemical security bills, we continue to believe CFATS is likely to be extended, as is, for another year. Doing so will provide additional time for Congress to sort through Committee jurisdictional issues; consult with the Administration; and conference substantive differences between the House, where Republicans would prefer a long-term extension of existing regulations, and the Senate, where Democrats would

prefer substantive reforms that would both strengthen chemical security standards to better protect public health and safety and expand the program to cover drinking water and wastewater facilities.

Clean Water Act

In the 111th Congress, Democratic leaders moved legislation through Congressional Committees that would have reformed and dramatically expanded the scope of the Clean Water Act (CWA). That legislation – to replace “navigable waterways” with “waters of the United States” – would have returned the CWA to pre-2001 status by overturning two Supreme Court rulings that some Members believe dramatically weakened the Federal Government’s jurisdictional authority. Opponents believed that the effort usurped local jurisdiction and broadened Federal jurisdiction far too much. Proponents continue to believe reform is necessary to restore CWA integrity and to better protect the environment.

In the 112th Congress, House Republican leaders collected 170 bipartisan Member signatures on an April 14 letter to both EPA and the Army Corp of Engineers in response to concerns with EPA’s draft Clean Water Protection Guidance. Members expressed concern that that guidance could significantly expand the Act’s scope in how “waters of the United States” are defined and regulated. On April 27, EPA released its draft multi-agency Clean Water Framework. The non-binding framework specifically omits reference included in the prior draft iteration to significantly expand federal CWA jurisdiction, which reflected some softening by the Administration. EPA Administrator Lisa Jackson said that the current guidance is flawed and under-protects the nation’s waters. In her view, the new rule will better clarify which waters do not fall under federal jurisdiction. A rulemaking will commence after the 60-day comment period closes on July 1, though no timeline has been provided on when a draft rule will be proposed.

House Water Resources and Environmental Subcommittee Chairman Bob Gibbs (R-OH) immediately blasted the framework, saying he would schedule oversight hearings on “EPA’s practice of circumventing the regulatory process by imposing costly, burdensome *de facto* rules disguised as mere advisory guidelines so that this blatant disregard for Congressional intent will be put to an end.”

Although Senate Environment and Public Works Committee Chairman Barbara Boxer (D-CA) is expected to resume legislative efforts to strengthen the Clean Water Act, that effort is unlikely to gain Republican approval in the House.

Climate Change / Energy Legislation

Senate Energy and Natural Resources Committee staff are in the process of reviewing comments received on the Clean Energy Standard (CES) White Paper offered by Chairman Jeff Bingaman (D-NM) and Ranking Member Lisa Murkowski (R-AK) this spring. It followed the President’s State of the Union Address, where he called on Congress to enact legislation that would increase the percentage of electricity generated from “clean energy” sources to 80% by 2035. Chairman Bingaman, who announced he will be retiring from the Senate next year, has historically been an ardent advocate of a strict Renewable Energy Standard – something that could yet emerge as a legacy issue for him, but in the form of a Clean Energy Standard and then only if it remains narrowly

focused. As Ranking Member Murkowski put it, if a CES bill becomes known as “cap and trade under a different name... then CES is not going to happen.”

The Committee has also been working on legislation to help promote clean energy investments. As Energy Secretary Steven Chu touts the current, but severely oversubscribed, DOE Loan Guarantee Program, Chairman Bingaman is working to move legislation that would authorize a “clean energy bank.” Secretary Chu has expressed a willingness to look at that kind of legislation. Consideration of draft Committee staff legislation, to create an independent Clean Energy Development Authority, was considered during a May 26th markup, but the Committee’s work has not yet been completed. Separately, Ranking Member Murkowski has expressed cautious optimism for moving legislation to incentivize electric vehicle development and deployment – provided that it is well-justified and fully paid for. The Committee has already favorably reported legislation to the Senate floor that would promote marine hydrokinetic power, guard the electric grid against cyber attacks, and incentivize advancements in carbon capture and sequestration technologies from power plants. Pending legislation includes bills to promote solar power, small nuclear reactors, and natural gas vehicles, among other technologies.

House Republican leaders have taken a different approach, principally focused on high gas prices. By May 12, the House had passed all three bills authored by Natural Resources Committee Chairman Doc Hastings (R-WA) to expand domestic offshore oil and gas production and expedite permitting. While the Administration issued critical Statements of Administration Policy, it stopped short of issuing veto threats; shortly thereafter, the President announced limited regulatory efforts to help coordinate the permitting process and expedite offshore drilling projects. The Senate Energy and Natural Resources Committee is expected to build upon comprehensive offshore drilling reform and oil spill response legislation that had been favorably reported in the 111th Congress. While Chairman Bingaman touted the effort as one of his highest priorities, hoping to move two bills to the Senate floor by June, neither received the endorsement of Ranking Member Murkowski and Committee consideration has been delayed.

Last month, after the Senate rejected both the Democratic Leadership-backed proposal to eliminate \$21 billion in oil industry tax credits and the Republican Leadership-backed proposal to expand and expedite domestic oil production, the Administration and some Senate Democrats now hope that needed legislative compromises to raise the federal statutory debt ceiling or to reduce the federal deficit can also carry provisions to repeal energy tax incentives. At the moment, we do not see any prospect for Democrats and Republicans to find common ground on the issue.

Telecommunications

Public Safety Interoperability / D Block Spectrum Allocation

On May 9, Senators Jay Rockefeller (D-WV) and Kay Bailey Hutchison (R-TX) introduced the *Public Safety Spectrum and Wireless Innovation Act* (S. 911). In a much anticipated markup, the Senate Commerce, Science, and Transportation Committee approved the measure on June 8 by a 21-4 vote (with Senators Olympia Snowe (R-ME), Jim DeMint (R-SC), Patrick Toomey (R-PA) and Marco Rubio (R-FL) voting no).

In addition to reallocating the 700 MHz D block, the bill would authorize \$12 billion for the deployment of a nationwide public safety broadband network, allow the Federal Communication Commission (FCC) to hold incentive auctions, and mandate other spectrum-management provisions. In authorizing incentive auctions, the bill calls for the FCC to compensate broadcasters for voluntarily giving up spectrum for wireless broadband as part of a larger effort to fund a nationwide public safety broadband network. The legislation would also compensate broadcasters who retain their spectrum but are repacked to make vacated spectrum available for broadband use, and would compensate cable operators for any adjustments they have to make with respect to retransmissions of the reconfigured broadcast signals.

Notably, the legislation contains a provision designed to make it easier for wireless companies to site antennas. It would prohibit state or local governments from denying requests to modify existing wireless towers as long as the modification "does not substantially change the physical dimensions of such tower." The legislation does not define "substantially change." However, such modifications would include co-location of new equipment, removal of equipment, and replacement of equipment.

The provision raises concerns among state and local officials, who say the language may negate Section 704 of the Telecommunications Act of 1996 by overriding the requirement that the federal courts have exclusive jurisdiction to address wireless tower disputes. Moreover, local officials are concerned the provision could compel approval even in the face of real, concrete public safety concerns, such as when new equipment that does not change the physical dimensions of the tower interferes with public safety communications.

The section also authorizes federal agencies to grant easements or rights-of-ways to install or maintain wireless equipment and requires the General Services Administration to develop a common rights-of-way application form. GSA would also have to develop master contracts governing the placement of wireless antennas on federal government property.

The bill was amended to make it clear that so-called white spaces of unused spectrum in the broadcast band would still be available nationally and in each market after the FCC repacks the spectrum. That amendment from Senator Maria Cantwell (D-WA) concerns broadcasters who worry about unlicensed devices causing interference to TV stations in the band. Following the vote on the Rockefeller-Hutchison substitute to the original S. 911 and several amendments like Cantwell's that were previously accepted, Senator Roy Blunt (R-MO), addressed repacking concerns, noting the FCC should protect viewers from losing their broadcast signal, in order to avoid the experiences of the digital TV transition two years ago where some viewers had their channel one day

and lost their signal the next. Senator Claire McCaskill (D-MO) also withdrew an amendment that she said would have prohibited the involuntary relinquishment of LPTV spectrum.

Public, Educational and Governmental (PEG) Channel Access

On May 5, Representative Tammy Baldwin (D-WI) was joined by Representative Steve LaTourette (D-OH) in re-introducing H.R. 1746, the Community Access Preservation (CAP) Act. Highlighting the importance of public, educational and government access (PEG) channels, Representative Baldwin stated that “Local access channels bring unique voices, perspectives, and programming to television. The nature of television programming is changing, as are the methods in which that programming is delivered. These changes should not come at the expense of the diversity and vibrancy of local voices.” In describing the need for the bill, Representative LaTourette added that “[t]hese stations don't receive federal funding. All this bill does is allow and empower local communities to keep their public access channels if they choose to do so.”

Historically, the number of channels and funding dedicated to PEG TV was negotiated as part of local cable franchise agreements between the cable company and the local community and each community determined its own investment in programming. However, recent state-level franchise laws in twenty states have jeopardized this balance and, some communities are already in line to lose all funding for PEG channels by 2012.

By allowing communities more flexibility to use PEG funding for more than “capital costs,” the CAP Act not only aims to save PEG channels but could also create or save between 7,000 and 10,000 jobs across the country. The bill specifically –

- Allows PEG fees to be used for any PEG-related purpose;
- Prevents cable operators from charging for the transmission of the channels;
- Requires the FCC to study the effect state video franchise laws have had on PEG channels; and
- Requires operators to provide the support required under state laws, or the support historically provided for PEG, or up to two percent of gross revenue, whichever is greater.

Wireless Competition Report

The Federal Communications Commission (FCC) is expected to release its wireless competition in the coming days. AT&T maintains that the wireless industry is competitive as it seeks FCC and Justice Department approval to acquire T-Mobile USA. Industry observers are eager to see whether the Commission will support AT&T's view through its competition report findings. If released this week, the report would be timely for parties wishing to file reply comments with the FCC on the proposed merger, which are due June 20.

FCC Notice of Inquiry regarding Local Rights of Way and Pole Attachment Fees

Initial comments responding to the April 7 Notice of Inquiry (NOI) are due July 18, with reply comments due August 30. At stake for local governments is millions of dollars in Rights of Way (ROW)-related revenues and loss of management authority over its ROWs.

To recap, on April 7, the FCC adopted orders on data roaming and pole that furthered recommendations of the National Broadband Plan. With respect to the pole attachment order, the Commission determined that “the lack of timelines for access to poles, the resulting potential for delay in attaching broadband equipment to poles, and the absence of adequate mechanisms to resolve disputes creates uncertainty that deters investment in broadband networks.”

To address these concerns, the FCC set: (1) a maximum time of 148 days for utilities to allow pole attachments in the communications space; and (2) a maximum of 178 days for attachments of wireless antennas on pole tops. The Commission intended to provide utilities with a fair rate in exchange for these time requirements by setting a rate for telecommunications companies near or at the rate cable providers pay. ILECs not subject to the rate schedule will be able to file complaints with the FCC alleging unfair terms, rates or conditions, and wireless providers would be entitled to the same rate as telecommunication providers.

The second order, requiring facilities-based providers of commercial mobile data services to offer data roaming arrangements on commercially reasonable terms and conditions, passed by party-line vote of 3-2. Commissioner McDowell argued that “(b)ecause data roaming *is not* a commercial mobile service, Section 332(c)(2) of the Act prohibits the Commission from subjecting the provision of data roaming to common carrier regulation.” Chairman Genachowski argued that “the framework we adopt leaves mobile service providers free to negotiate and determine, on an individualized case-by-case basis, the commercially reasonable terms of data roaming agreements. Under the law, this is the very opposite of common carriage.”

The NOI seeks information regarding local governments’ compensation and policies regarding rights of way management. The U.S. Conference of Mayor’s, the National League of Cities, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, and other national organizations have filing comments reflecting the interests of local governments.

Municipal Bonds

On May 17, Senators Jeff Bingaman (D-NM), Mike Crapo (R-ID), John Kerry (D-MA), Olympia Snowe (R-ME), Ben Cardin (D-MD), and Charles Grassley (R-IA) – all members of the Senate Finance Committee – introduced *The Municipal Bond Market Support Act of 2011*. The bill would extend the *American Recovery and Reinvestment Act* (ARRA) provision that made it easier for municipalities to raise capital for infrastructure projects by raising the debt limit to \$30 million. Prior to ARRA, banks were incentivized to purchase municipal bonds from municipalities that issued only \$10 million or less in debt each year. The ARRA provision expired at the end of 2010; the Bingaman proposal would make the \$30 million level permanent.

Repeal of Three-Percent Withholding IRS Provision

On May 9 the IRS issue a notice extending the effective date of Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 from January 1, 2012 to January 1, 2013. Section 511 mandates State and Local governments that expend more than \$100 million per year in outside contracts to withhold three percent of all payments for goods and services, remit that three percent to the IRS and adhere to new reporting requirements. The May 9 notice also exempts payments of less than \$10,000.

While this temporarily alleviates the urgency to pass legislation repealing the provision, the *Withholding Tax Relief Act of 2011* (H.R. 674 / S. 89 / S. 164) introduced earlier this year continues to pick-up cosponsors. As previously reported, the measure was also proposed as an amendment to the Small Business Reauthorization (S. 493), which was on the Senate floor for several days in April, but became jammed up with amendments and was removed from floor consideration when the Senate adjourned for the spring recess. It remains unclear when the bill will be brought up again.

Economic Development Administration (EDA) Reauthorization

The Economic Development Revitalization Act of 2011 (S. 782), which would authorize EDA at \$500 million per year for 2011 through 2015, was brought up for consideration on the Senate floor June 6 (the current EDA authorization expired on September 30, 2009). So far, dozens of extraneous amendments have been introduced and remain pending. The bill remains on the Senate schedule this week, but its prospects for completion are uncertain.