

# GOVERNMENT MATTERS

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## **Climate Change Policies Face Challenges in Congress**

During his [second inaugural address](#) on Jan. 21, President Obama announced that the United States will respond to the growing threat of climate change. Environmental [advocates applaud](#) the president for addressing this generation-defining problem and hope he will elaborate on his strategy for tackling climate change during tonight's State of the Union address, but they recognize that the administration will face serious challenges in moving crucial policies forward.

### **New Report Identifies Necessary Steps for Reducing Greenhouse Gas Emissions**

According to a new [report](#) released by the World Resource Institute last week, the U.S. will not be able to achieve a 17 percent reduction in greenhouse gas emissions by 2020, a pledge the U.S. made at the [2009 Conference](#) of the Parties of the United Nations Framework Convention on Climate Change in Copenhagen, Denmark, unless it makes current emissions standards stricter. The report identifies several legal tools already available to federal and state governments to substantially reduce greenhouse gas emissions. It recommends the administration take four key steps to make good on its greenhouse gas reduction commitments.

First, EPA should use its authority under the Clean Air Act to set stricter emissions limits for power plants, which contribute more to the level of greenhouse gas emissions in the United States than any other sector. EPA can do so by finalizing its [proposed rule](#) on greenhouse gas emissions limits for new

and modified power plants and issuing similar standards for existing power plants. States can assist EPA's efforts by promoting the use of alternative, renewable energy and working to reduce demand for electricity.

Second, EPA and states can reduce methane emissions from natural gas systems by requiring better controls on leaks from natural gas operations and from abandoned wells. Third, EPA should use its authority under the Clean Air Act to begin phasing out hydrofluorocarbons (HFCs), compounds used for air conditioning and refrigeration that emit greenhouse gases, which contribute to climate change. Fourth, EPA and the states should set new standards to improve energy efficiency across the residential, commercial, and industrial sectors.

EPA [plans to finalize](#) emissions limits for new power plants this spring but has not yet proposed similar limits for existing plants or for methane emissions from drilling operations.

### **Greenhouse Gas Reductions Threatened by Rulemaking Roadblocks**

The U.S. Supreme Court [ruled](#) in 2007 that the EPA has the authority to regulate greenhouse gases under the Clean Air Act. About two years later, the agency issued an "endangerment finding," concluding that greenhouse gases endanger public health and the environment and should be regulated. So far, EPA has used this authority to set vehicle emissions standards and to propose first-time greenhouse gas emission standards for new electric power plants. EPA's endangerment finding was [upheld](#) by a federal appeals court, but many House majority members remain focused on undermining agency science and blocking new rules.

Although EPA already has the legislative authority it needs to make significant progress in greenhouse gas reductions, Congress has tried to obstruct its efforts through investigations, appropriations restrictions, and other efforts. For example, the House Energy and Commerce Committee has announced [plans](#) to investigate EPA's efforts to regulate greenhouse gases under the Clean Air Act, including the scientific basis for the agency's decisions.

Last year, proposed greenhouse gas regulations were a frequent target of the Energy and Power Subcommittee. Rep. Ed Whitfield (R-KY), the subcommittee chairman, convened a [number of hearings](#) to criticize what he [referred](#) to as "EPA's war on coal." More recently, Whitfield cautioned that he would take the same approach to new rules limiting greenhouse gas emissions from existing power plants. "We're going to be very aggressive in letting them know that if they try to start doing this with existing plants, they're going to have a real battle on their hands," he [said](#). Congress also targeted agencies' authority to regulate greenhouse gases and fund renewable energy projects last year using anti-environmental [bills](#) and [appropriations riders](#). Members will likely employ these tactics again to thwart new efforts to address climate change.

In addition to congressional interference, agencies will face a number of other obstacles in combating climate change. Rulemaking delays, special interest influence, and [legal challenges](#) to agency actions could stall or quash new regulations before they become effective. Despite the social and environmental [costs of delay](#), it often takes agencies years to develop and issue new rules, which are then subjected to extensive delays while under review at the Office of Information and Regulatory

Affairs (OIRA). Special interests often use this time to weaken new rules. Even after agency actions make it through this arduous process, they can get tied up in lengthy and costly court cases before becoming effective.

### **The Administration's Next Move**

Federal agencies are beginning to recognize the importance of combating and adapting to climate change. The EPA recently [invited](#) public comment on its draft adaptation plan, which identifies actions the agency will take to respond to the challenges that a changing climate poses to fulfilling its mission and protecting human health and the environment. The Department of the Interior released a similar [plan](#) last week.

As the WRI report illustrates, the U.S. could meet near-term reduction goals using existing legal authority. According to some [reports](#), President Obama's State of the Union address will reveal a new strategy to use that authority to curb greenhouse gas emissions from some of the largest sources. However, new emissions standards will face staunch opposition from some industry sectors.

It appears the administration is willing to make a strong commitment. The question now is, will Congress find a way to work with the president, or will it stand in the way of achieving meaningful greenhouse gas reductions?

### **CBO Report Reveals Economic Damage Done by Deficit Reduction**

A new [report](#) from the Congressional Budget Office (CBO), released Feb. 5, reveals that the federal budget deficit is now on track to drop below \$1 trillion for the first time in several years. It is expected to drop further for several more years without any additional efforts at deficit reduction. However, this drop has been bought at a significant cost, including substantially reduced economic growth and higher unemployment.

According to the report, the deficit will drop below \$1 trillion to \$845 billion in 2013, eventually reaching a low of \$430 billion in 2015 before increasing again in the latter half of the decade. As a share of the economy, the deficit will drop from a high of 10.1 percent in 2009 to 5.3 percent in 2013 (a drop of almost half). It is projected to drop further to 2.4 percent of GDP by 2015.

This progress has come at a price. According to the report, economic growth in 2013 will be just 1.4 percent, substantially lower than the average 1.8-2.4 percent growth experienced over the past three years. This slower growth will affect unemployment, which is projected to rise back to 8 percent in 2014 before declining again.

These projections reflect several improvements in the economy, including gains in the housing sector, higher stock prices, and increased availability of credit. However, those changes have been substantially offset by contractionary budget policies.

According to the report, "CBO estimates that economic growth in 2013 would be roughly 1½ percentage points faster than the agency now projects if not for the fiscal tightening." Moreover, "Although CBO anticipates faster economic growth after this year, output is likely to remain below its potential (or maximum sustainable) level until 2017—almost a decade after the recession started in December 2007."

CBO's estimates are based on current law. According to the report, deficit reduction in the short-term will be due partly to an increase in tax revenues, both because of improvements in the economy (compared to recession levels) and because of the cancellation of Bush-era tax cuts for the wealthiest Americans, which was included in deficit reduction legislation signed into law in early January. According to the report, federal revenues will increase by roughly 25 percent between 2013 and 2015. As a share of the economy, they will rise from 15.8 percent in 2012 to 19.1 percent in 2015.

Spending, meanwhile, is projected to decline over the next several years, from 22.8 percent of GDP in 2012 to 21.5 percent by 2017, before slowly growing again. This overall number, however, masks a significant drop in discretionary spending (this covers all non-entitlement spending, including education, environmental programs, transportation, and much more). According to the report, this spending will drop steadily from 8.3 percent of the economy in 2012 to 5.5 percent by 2023, a drop of one-third. This projection assumes current law is fully implemented, including across-the-board spending cuts (called sequestration) that are slated to begin starting March 1.

These cuts in discretionary spending are offset, however, by a slight increase in entitlement spending during that same period, from 13.1 percent of GDP in 2012 to 14.1 percent by 2023, and a much larger projected increase in net interest on the debt (from 1.4 to 3.3 percent of GDP), due primarily to substantially higher projected interest rates.

Because the report shows deficits increasing again in the latter half of the decade, deficit hawks are likely to cite this report as proof that further deficit reduction is needed. But a closer examination reveals that substantial progress has already been made – and at significant cost to the nation in lost economic growth and lost jobs.

Simply put, now is not the time for more austerity. To the extent they remain problems, the federal deficit and debt are long-term problems demanding long-term solutions. Those solutions should be focused primarily on containing the rising costs of health care (in both the public and private sectors) and raising revenues to levels last seen during the Clinton years, which was the last time the federal government experienced a budget surplus.

But those solutions can wait until the economy has recovered. Moving too quickly may put our current economic recovery – already anemic – in serious jeopardy.

## **Oil and Gas Production a Major Source of Greenhouse Gas Emissions, EPA Data Reveals**

On Feb. 5, the U.S. Environmental Protection Agency (EPA) [released new data](#) indicating that in 2011, the oil and natural gas sector was the second-highest contributor of greenhouse gases such as carbon dioxide, methane, and nitrous oxide. A method of natural gas drilling, known as hydraulic fracturing or fracking, is a major component of this industry. Given this data and [its stated commitment to addressing climate change](#), the Obama administration will have to reconsider its strong support of natural gas production.

### **EPA’s Greenhouse Gas Reporting Program**

The data comes from an EPA database of greenhouse gas emissions from more than 8,000 industrial facilities, such as power plants and oil refineries. In 2008, Congress required the EPA to begin collecting the data, and last year the agency released initial greenhouse gas data from 29 source categories. The new 2011 greenhouse gas data includes 12 additional source categories for a total of 41 sources across nine major industries. The most notable expansion was the first-time inclusion of nine source categories that make up the oil and gas industry sector. The data was also expanded to include methane emissions, generally produced by large emitters in the oil and gas industry.

The greenhouse gas reporting program covers an estimated 85 to 90 percent of total greenhouse gas emissions in the United States. The data is limited because only facilities emitting 25,000 tons or more annually (equivalent to the carbon dioxide released from burning 131 rail cars worth of coal) are required to report. The data also excludes emissions from transportation and agricultural facilities.

The EPA released the greenhouse gas data in a publicly accessible web-based tool called [FLIGHT](#) (or Facility Level Information on GreenHouse gases Tool). The tool gives the public the ability to search and use greenhouse gas data to foster public awareness and/or encourage research on local environmental problems. Citizen activists can use the data to push for significant reductions in emissions in their communities. Companies can use the data to compare their performance against others in their sector and set goals for increased efficiency. State and local officials can also use the data to compare the effectiveness of their policies and practices with those operating in other parts of the country.

### **Oil and Gas Sector is the Second-Largest Source of Greenhouse Gases**

Power plants remain the top U.S. emissions source, accounting for more than 2 billion metric tons, or a third of total U.S. "carbon dioxide equivalent" (carbon dioxide, methane, and other gases that contribute to climate change) in 2011. The oil and natural gas sector emitted 225 million metric tons of carbon dioxide equivalent that year, making it the second-largest major industry sector producing greenhouse gas pollution. Refineries came in third with 182 million metric tons of emissions. The top five sectors are listed in Table 1.

**Table 1**

<b>Rank</b>	<b>Main Industry Sectors</b>	<b>Emissions</b>
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		<b>(Million Metric Tons CO2 equivalent)</b>
1	Power Plants	2,221
2	Oil and Natural Gas	225
3	Refineries	182
4	Chemicals	180
5	Other (electronics, food processing, manufacturing, military, etc.)	126

Among the source categories, which are subcategories of industry sectors, two oil and natural gas activities rank in the top ten being tracked. Onshore oil and gas production ranks third, and natural gas processing ranks sixth. Power plants and refineries are the only two industry sectors that do not have subcategories and are listed as their own source categories (see Table 2 below).

**Table 2**

<b>Rank</b>	<b>Source Categories</b>	<b>Emissions (Million Metric Tons CO2 equivalent)</b>
1	Power Plants	2,221
2	Refineries	182
3	Onshore Oil and Natural Gas Production	94
4	Iron and Steel Production	91
5	Municipal Landfills	81
6	Natural Gas Processing	62
7	Cement Production	56
8	Petrochemicals	53
9	Hydrogen	34
10	Lime Manufacturing	31

While the oil and natural gas sector includes a wide range of exploration and production activities, fracking has become the primary method companies use to extract natural gas. Traditional drilling for oil and gas has declined as reservoirs of easy-to-access oil and gas have been depleted. The top oil and natural gas sources also indicate the large contribution fracking activities are making to the industry sector's greenhouse gas emissions. The data was not collected on individual wells but instead aggregated emissions from large production areas or basins. The highest emissions came from New Mexico's San Juan Basin and Texas' Permian Basin, where advances in horizontal drilling and fracking have led to a boom in shale gas and shale oil production. Emissions from onshore production (which includes fracking) were primarily methane. Methane is a greenhouse gas that is 21 times more powerful than carbon dioxide.

In recent years, scientists and environmentalists have emphasized the polluting nature of fracking, despite the repeated claims by industry about "clean natural gas." A [Cornell University study](#) showed that fracking produces more greenhouse gas emissions over time than traditional methods of oil drilling or coal mining, due to hauling in large quantities of water by truck and the methane released from fracking wells. Since the EPA greenhouse gas data does not include emissions from

transportation, the total amount of emissions contributed by the oil and gas sector is likely underreported. Greenhouse gas emissions are not the only concern involved in fracking; the drilling method has been linked to a growing number of cases of water and land contamination.

### **Administration's Conundrum**

In his inauguration speech last month, President Obama vowed to "respond to the threat of climate change," and [the administration has already taken some action](#) in this direction. The latest EPA greenhouse gas data make clear that the Obama administration, as part of its approach to climate change, should pursue significant emissions reductions from the oil and gas industry and implement strong safeguards to rein in the pollution associated with fracking.

### **Conclusion**

Climate change is the most significant environmental concern of our lifetimes, and comprehensive action is essential. The latest data on greenhouse gas emissions clearly establishes that the oil and natural gas sector emit considerably more greenhouse gas pollution than previously believed. If we are going to limit greenhouse emissions and address climate change, stronger pollution controls on oil and gas operations, as well as power plants, are needed.

## **Congress Asking the Right Questions on FOIA**

A recent letter from Congress to the Justice Department represents a positive development toward strengthening the Freedom of Information Act (FOIA). The [letter](#), sent Feb. 4 by the House Committee on Oversight and Government Reform, asks what steps the government is taking on a number of key transparency improvements. The reforms, if implemented, could significantly improve the public's access to information about critical topics such as food safety, compliance with environmental standards, and special interest influence in government decision making.

### **Thoughtful Oversight**

The letter, signed by committee chair Darrell Issa (R-CA) and ranking member Elijah Cummings (D-MD), indicates a bipartisan approach to congressional oversight of the executive branch's responsibilities to be transparent under FOIA. In the letter, Issa and Cummings ask for information about a number of key issues in FOIA administration, including the following:

- Outdated regulations that may be hampering agency responsiveness to FOIA requests. A [recent study](#) by the National Security Archive found that a majority of agencies have not updated their regulations since FOIA was last changed in 2007.
- Proactive disclosure of public information and whether agencies are posting frequently requested records online as required by the Electronic FOIA Act. A 2012 [audit](#) by the Government Accountability Office found that "not all agency components are giving sufficient attention" to complying with that requirement, and the Center for Effective Government's

Gavin Baker called for more congressional oversight of this provision in a Jan. 28 [presentation](#) at the Advisory Committee on Transparency.

- Backlogs in responding to requests and what the Department of Justice is doing to reduce them, especially at agencies with significant backlog problems (the Department of Homeland Security, for example).
- The use of exemptions to withhold information from the public and whether agencies are reducing their use of such exemptions.
- Fees that agencies charge for copying and other services when responding to FOIA requests and whether those fees have been adjusted as required by the OPEN Government Act.

The committee sent the letter to the Justice Department's Office of Information Policy, which oversees agency compliance with FOIA. The office – and the Obama administration – should welcome this oversight and respond substantively to the questions. Such a response could initiate a frank conversation about how to better fulfill the promise of the FOIA: that what is known by the government will be known by the people.

Open government advocates praised the letter. The Sunshine in Government Initiative [said](#) the letter asks "pointed questions," and the *Washington Examiner's* Mark Tapscott [wrote](#) that it "could be the most comprehensive congressional review [of FOIA] in three decades."

### **The Department of Justice and Freedom of Information**

The Justice Department derives much of its influence on FOIA matters from its role as the government's lawyer. Under FOIA, requesters who feel the agency has not fulfilled its legal obligation may challenge the agency in court. Such lawsuits typically question an agency's withholding of information or failure to promptly respond to requests for information.

Despite the fact that each agency makes its own decisions on responding to FOIA requests, it is the Justice Department that decides whether, and how, to legally defend the actions in question in such cases. Consequently, department lawyers exercise discretion about which cases can and should be defended, and which should instead be settled. This makes the Justice Department the final arbiter within the executive branch of what kind of agency activity under FOIA is acceptable.

In his [2009 FOIA memo](#), President Obama made clear his standards for appropriate compliance with FOIA. "Agencies should adopt a presumption in favor of disclosure," directed Obama, and "act promptly and in a spirit of cooperation." Obama's memo also tasked Attorney General Eric Holder, who heads the Justice Department, with issuing further guidelines to agencies. In those [guidelines](#), Holder explained that the Justice Department *would not* defend an agency's action merely because it could be construed to fall within the technical confines of the law. Instead, the Justice Department would only side with an agency against the right of the public to access certain information if the agency reasonably foresaw that disclosing that information would cause actual harm. This bold move put the government on the side of openness, with the onus on the agency to justify the need for secrecy.

However, President Obama's FOIA goals have not yet been realized. The committee's letter notes that, [according to the National Security Archive](#), the Justice Department "cannot point to a single case of agency withholding that it has refused to defend under the new guidance from the Obama and Holder memos in 2009." Furthermore, despite the department's pledge to take fewer cases to court and a [2007 law](#) designed to allay FOIA litigation, in fact the opposite has occurred, with data showing [increased FOIA lawsuits](#) during the Obama administration.

In their letter, Issa and Cummings ask the Justice Department to explain these discrepancies. Particularly, the committee leaders ask what actions have been taken to enforce President Obama's stated commitment to openness and to avoid the need for FOIA litigation.

## **Conclusion**

The congressional letter poses key questions that strike at the heart of how well the government is managing its duties under FOIA – and whether agencies will ensure that Americans can access public information without lengthy delays and court battles. Understanding what actions the Justice Department and agencies have taken will help clarify what can be done to strengthen transparency.

Agencies' annual FOIA reports are being finalized and released, and the data should indicate how well agencies have performed in processing requests, disclosing information, and using exemptions to withhold records. However, the data never sufficiently reveals why agency performance has excelled or lagged in a particular year. Agency responses to this congressional inquiry may shed important light on those very reasons.

## **Court Invalidates National Labor Relations Board Recess Appointments, Future of Consumer Financial Protection Bureau Director Now Uncertain**

On Jan. 25, the D.C. Circuit Court of Appeals [invalidated](#) three recess appointments to the National Labor Relations Board (NLRB). President Obama made these appointments on Jan. 4, 2012, the same day he appointed Richard Cordray as Director of the Consumer Financial Protection Bureau (CFPB), a crucial agency designed to protect Americans from abuses by credit card companies and others in the financial industry.

The day before the president made the appointments, the Senate convened the second session of the 112th Congress, although few senators attended the so-called "pro forma" session, and the only order of business was to adjourn until Jan. 6. The Obama administration viewed the Senate as being in recess between Jan. 3 and Jan. 6, 2012, since members were not present or conducting any business. When appointing Cordray and the NLRB members, President Obama relied on the Appointments Clause in Article II of the U.S. Constitution, which states, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

However, critics of the NLRB's decisions challenged President Obama's ability to make appointments during short recesses after a new session of Congress has started, despite the fact that presidents have been making recess appointments during such congressional breaks for more than 100 years. Instead, critics of the board argued that a president may make a recess appointment only during "the Recess" between the first and second years (sessions) of each Congress.

The D.C. Circuit agreed with this interpretation of the Appointments Clause. The court said that because the NLRB vacancies at issue did not arise during "the Recess," the three members were not lawfully appointed.

Although an appeal to the U.S. Supreme Court is expected, the D.C. Circuit's decision threatens to invalidate hundreds of NLRB decisions issued over the past year. It also means that the board no longer has a quorum and cannot hear appeals. Without a quorum, contested union elections and unfair labor practices cannot be resolved until the Senate confirms new members of the board.

Unless the Supreme Court overturns the case, Obama's high-profile appointment of Cordray to head the Consumer Financial Protection Bureau could also be challenged. The [Dodd-Frank Act](#) required a director to be lawfully appointed before the agency could issue certain rules or pursue enforcement actions. Thus, if Cordray's appointment is invalidated, any related activity that occurred during his time at CFPB could be struck down by the courts. Sen. Mike Johanns (R-NE) has also proposed [a bill](#) that would halt all funding to the CFPB for any actions that require a director.

For more than a century, many presidents have exercised the power to make recess appointments during "the Recess" between sessions of Congress and less formal recesses. Dozens of agencies have relied on recess appointments to keep the business of government moving forward over the years. Even the judges on the D.C. Circuit recognized that their interpretation of the Constitution is incompatible with history.

Given the gridlock facing nominees for boards and commissions, the limits placed on recess appointments by the court will mean more agencies will have more vacant positions for longer periods of time. Those agencies will only be able to conduct some of the business Congress has assigned to them, or acting administrators will make key policy decisions. While some sources have framed the court's decision as a huge blow to President Obama, the ruling actually represents [a significant limitation on the power of any president](#) to run the government effectively.



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2040 S Street, NW, 2nd Floor

Washington, DC 20009

202-234-8494

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