

U.S. Senate passes joint resolution disapproving Trump oil and gas methane rule

On April 28, 2021, the U.S. Senate passed a joint resolution, known as S.J. Res. 14,¹ retroactively revoking a Trump administration rule² revising Obama-era Clean Air Act New Source Performance Standards for the Crude Oil and Natural Gas Industry at 40 C.F.R. Part 60, Subparts OOOO and OOOOa (NSPS) that were initially promulgated in 2012 and 2016.³ The joint resolution, if enacted into law, would reinstate Obama administration rules regulating the methane emissions from the oil and natural gas industrial sector, including the production, processing, transmission and storage segments.

The Trump administration's Policy Amendments rule

The joint resolution takes aims at a specific Trump administration rule published in the *Federal Register* on September 14, 2020. Referred to as the "Policy Amendments," the rule resulted in four key changes to these NSPS, which were promulgated in 2012 and 2016.

First, the Policy Amendments removed the transmission and storage segment, including transmission compressor stations, pneumatic controllers and underground storage vessels. In removing the transmission and storage segments from regulation under the NSPS, the U.S. Environmental Protection Agency (EPA) found that the segments were improperly regulated because the statutory-mandated finding that sources contribute significantly to air pollution was not made when the segments were added to the industrial sector and the

NSPS in 2012 and 2016.

Second, the Policy Amendments rescinded the methane emission requirements for the production and processing segments of the sector, which include various emission sources at well sites, gathering and boosting compressor stations, and natural gas processing plants.

Third, by removing the methane limits on the production and processing segments, the Policy Amendments eliminated the Clean Air Act (CAA) requirement to regulate methane emissions from existing sources from within these segments.

Fourth, as an alternative basis for rescinding the limits on methane emissions, the Policy Amendments concluded that the 2016 rule adding methane limits was the product of an insufficient finding that did not satisfy CAA standards. While the Policy Amendments rule resulted in surgical deletions and revisions to the NSPS, it was based upon the Trump administration's views and interpretations regarding the scope of the CAA's NSPS provisions and how they are to be applied to previously unregulated sources and air pollutants.

Notably, the joint resolution left a companion rule promulgated by the Trump Administration known as the "Technical Amendments" untouched.⁴

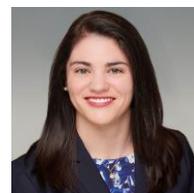
Congressional Review Act-based revocation

To revoke the Policy Amendments rule, the Senate invoked its authority under the Congressional Review Act (CRA). The CRA grants Congress the authority to overturn a federal regulation in its

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¹ S.J. Res. 14, 117th Cong. (2021).

² "Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources Review," 85 Fed. Reg. 57018 (Sept. 14, 2020).

³ "Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews; Final Rule," 77 Fed. Reg. 49490 (August 16, 2012); "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule," 81 Fed. Reg. 35824 (June 3, 2016).

⁴ "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration," 85 Fed. Reg. 57398 (Sept. 15, 2020).

entirety by simple majority votes within specified time periods after the rule is promulgated. Although the CRA is not limited to use in presidential administration changes, it typically is used after such a change as an oversight mechanism for so-called “midnight rules.”

The most potent aspect of a CRA resolution disapproving a federal regulation is that the federal agency may not reissue the rule in “substantially the same form” or issue a “new rule that is substantially the same,” “unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”⁵ The CRA does not define “substantially the same” and is silent on who is responsible for making a determination on whether a new rule is “substantially the same.” For amendments to existing rules, like the Policy Amendments rule, a CRA joint resolution revokes the amendments and leaves the previously existing rule in place.⁶

S.J. Res. 14 passed by a vote of 52-42, with Republican Senators Susan Collins (Maine), Lindsay Graham (South Carolina), and Rob Portman (Ohio) joining Democratic Senators in approving the resolution. Several Republican Senators, including Patrick Toomey (Pennsylvania), did not vote on the joint resolution. The day before the Senate’s vote, the Biden administration urged the Senate to invoke its CRA authority stating that “the oil and gas sector is the largest industrial source of methane emissions” and that “addressing methane pollution from this and other sectors is an urgent and essential step” to “effectively mitigate climate change.”⁷

Unresolved questions about CAA regulation of methane emissions and compliance

Although a CRA revocation of the Policy Amendments is not yet final, it likely is only a matter of time before a Democratically controlled House of Representatives votes to pass the joint resolution and President Biden signs the resolution into law. Legally, a CRA-disapproved rule is treated “as though such rule had never taken effect.”⁸ As such, upstream and midstream operators would be well-advised to revisit the 2012 and 2016 NSPS rules and evaluate compliance with their requirements. Practically, reinstating the methane requirements of the 2016 NSPS should have very little impact on production and processing facilities currently subject to the 2016 NSPS, as the methane reductions in the 2016 NSPS rule were incidentally achieved through volatile organic compound (VOC) control requirements. Transmission and storage facilities, where but for the Policy Amendments the 2012 and 2016 NSPS currently would apply, should review and

prepare to comply with the originally promulgated rules.

If finalized, a CRA-based revocation of the Policy Amendments rule will raise significant questions. Ideally, EPA would provide guidance to affected facilities, particularly for transmission and storage facilities constructed, modified or reconstructed sources after September 14, 2020, in reliance on the Trump administration’s rule concluding that the 2016 NSPS did not apply to such sources. In addition, EPA most likely will need to issue a *Federal Register* notice reinstating the 2012 and 2016 NSPS as originally promulgated. Affected facilities will want to look closely at any Federal Register notice issued by EPA, especially any effective date for reinstating the 2012 and 2016 NSPS.

Congressional revocation of the Policy Amendments rule may also revive currently stayed multi-party litigation over the 2012 and 2016 NSPS. It would also revive EPA’s obligation under section 111(d) of the CAA to regulate methane emissions from existing sources within the oil and natural gas source category. Beyond that, Congress’ likely repudiation of the Trump administration’s interpretations in the Policy Amendments rule may also have lasting impacts on the regulation of greenhouse gas emissions from the oil and natural gas and other industrial sectors regulated under section 111 of the CAA.

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⁵ 5 U.S.C. § 801(b)(2).

⁶ See 5 U.S.C. § 801(f).

⁷ Executive Office of President, Office of OMB, Statement of Administration Policy (April 27, 2021).

⁸ 5 U.S.C. § 801(f).