

Congressional Review Act Resolution Changes both Scope and Effect of EPA's Methane Rule

Update

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On June 30, 2021, President Biden signed into law a resolution under the Congressional Review Act (CRA) that disapproved a final rule adopted by the prior administration that made significant changes to 40 C.F.R. Part 60, Subpart OOOOa – the federal New Source Performance Standards (NSPS) that apply to sources in the oil and natural gas sector, commonly known as the “Methane Rule.” The CRA resolution rightfully received a great deal of attention because it re-institutes the regulation of methane under the NSPS, an important precedent for the Environmental Protection Agency (EPA) regulating methane from existing oil and gas sources. And while the CRA resolution set the table for EPA's future regulation of methane emissions from existing oil and gas sources, it also had a more-immediate impact: sources in the “transportation and storage” segment of the industry, which had been dropped from coverage under the oil and gas NSPS by the prior administration, are once again subject to oil and gas NSPS requirements, effective immediately.

Congressional Review Act: Under the CRA, Congress can disapprove an agency rule during a short window of time following the rule's adoption. Disapproval of an agency rule requires both chambers of Congress to pass a resolution that must then be signed by the President. While the circumstances in which the CRA comes into play are rare (*i.e.*, an agency rule adopted shortly before a change in party in the White House, where both chambers of Congress will vote to overturn the prior administration's rule), EPA's September 2020 changes to the Methane Rule fell into the window for possible CRA action by the Biden Administration.

September 2020 Methane Rule Amendments: NSPS Subpart OOOOa applies to oil and gas sources for which construction, modification, or reconstruction started after September 18, 2015. 40 C.F.R. § 60.5360a *et seq.* In September 2020, EPA adopted key amendments to Subpart OOOOa that it is calling the “2020 Policy Rule.” 85 *Fed. Reg.* 57018 (Sept. 14, 2020). The

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2020 Policy Rule both (1) rescinded the regulation of methane emissions under NSPS OOOOa and (2) rescinded all federal NSPS requirements from sources in the transportation and storage segment of the oil and gas industry – both the Subpart OOOOa requirements that apply to post-September 18, 2015 sources *and* the Subpart OOOO requirements that apply to post-August 23, 2011 oil and gas sources. By eliminating the regulation of methane under Subpart OOOOa, EPA had effectively removed a necessary precedent to further regulation of methane emissions from existing sources in the oil and gas industry under the federal Clean Air Act. And by rescinding the Subpart OOOO and OOOOa requirements for sources in the transportation and storage segment, EPA had eliminated all oil and gas NSPS requirements for those sources – sources in the transportation and storage segment were no longer regulated under the federal NSPS.

June 30, 2021 CRA Action on the Methane Rule: President Biden signed into law a joint resolution of Congress disapproving the 2020 Policy Rule on June 30, 2021. The effect of the President signing a CRA resolution is similar to a court vacating the rule – it effectively wipes the rule from the books, as if it was never adopted in the first place. The CRA action on Subpart OOOOa effectively reverted Subpart OOOOa to the rule language that was in-place immediately prior to the adoption of the 2020 Policy Rule.

It is important to note that the recent CRA action did not undo *all* of the changes to Subpart OOOOa that the prior administration adopted in 2020. In addition to the 2020 Policy Rule, EPA had adopted a series of substantive changes to Subpart OOOOa (e.g., changes to the required fugitive monitoring schedule) following its reconsideration of the Methane Rule, in a rule package that EPA is calling the “2020 Technical Rule.” 85 *Fed. Reg.* 57398 (Sept. 15, 2020). The CRA action *did not* impact the changes to Subpart OOOOa adopted in the 2020 Technical Rule – except for the changes as applied to the sources in the transportation and storage segment, as described below.

CRA Impact – Regulation of Methane: As stated above, the CRA action means that methane is once again regulated under Subpart OOOOa. By re-instituting the regulation of methane under Subpart OOOOa, the CRA action has now set the table for EPA to regulate methane emissions from *existing* sources in the oil and gas industry under the federal Clean Air Act. EPA has stated that it intends to issue a proposed rulemaking that will regulate methane emissions from existing oil and gas sources in September 2021. (Note that CRA action affecting methane does not actually change the substantive emissions control requirements of Subpart OOOOa, because the same emissions control requirements applied for the control of both methane emissions and emissions of volatile organic compounds (VOCs), and the 2020 Policy Rule did not eliminate those VOC control requirements.)

CRA Impact – Regulation of Transportation and Storage Sector: By rescinding the 2020 Policy Rule, the CRA action means that sources in the

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transportation and storage sector are once again regulated under NSPS Subparts OOOO and OOOOa.

The timing of EPA's adoption of the 2020 Policy Rule and the 2020 Technical Rule creates additional complexity for sources in the transportation and storage sector. While the 2020 Policy Rule and the 2020 Technical Rule were published in the Federal Register on consecutive days in September 2020, the 2020 Policy Rule was effective on the day it was adopted (September 14, 2020) and the 2020 Technical Rule had an effective date of November 16, 2020. The CRA action's impact on the sources in the transportation and storage sector is to require those sources to comply with the versions of NSPS Subparts OOOO and OOOOa that were in-effect immediately prior to the 2020 Policy Rule; as a result, transportation and storage sector sources are currently subject to NSPS Subparts OOOO and OOOOa *without* the changes made in the 2020 Technical Rule.

In a question-and-answer document explaining the impact of the CRA action, EPA directed transportation and storage sector sources to comply with the following versions of the oil and gas NSPS:

- Subpart OOOO, version adopted at 77 *Fed. Reg.* 49542 (Aug. 16, 2012), as amended at 81 *Fed. Reg.* 35896 (June 3, 2016);
- Subpart OOOOa: version adopted at 81 *Fed. Reg.* 35898 (June 3, 2016), as amended at 83 *Fed. Reg.* 10638 (Mar. 12, 2018).

EPA plans to move forward with rulemaking to address the transportation and storage segment, which may result in the 2020 Technical Rule changes being extended to those sources, in September 2021. Until that rulemaking is completed, however, sources in that segment do not have the benefit of the changes adopted as part of the 2020 Technical Rule, and must comply with the versions of NSPS Subparts OOOO and OOOOa that existed prior to September 2020.

For more information regarding NSPS Subparts OOOO and OOOOa or EPA's other recent actions relating to the regulation of oil and gas sources, please contact a member of Bracewell's Environment, Land, and Resources Group.