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CONGRESS ON TRACK TO REJECT TRUMP EPA REVISIONS TO OIL AND GAS METHANE STANDARDS

To Our Clients and Friends:

On April 28, 2021, the U.S. Senate approved a resolution to repeal EPA's 2020 policy amendments to regulations of upstream and midstream oil and gas operations. Under the 2020 policy amendments, the Trump Administration had declined to regulate oil and gas transmission and storage operations or set methane emission limits under Section 111 of the Clean Air Act's ("CAA") New Source Performance Standards ("NSPS"). If the U.S. House of Representatives approves the resolution and it is signed by the President, then the 2020 policy amendments would no longer be in effect, thus restoring key aspects of an earlier rule from the Obama Administration regulating methane from production and processing facilities at upstream oil and gas facilities as well as transmission and storage operations.

Key Takeaways:

- The recent Senate resolution targets the last Administration's rulemaking declining to regulate methane emissions from production and processing operations at oil and gas facilities. The soon-to-be repealed rule also declined to regulate associated transmission and storage operations.
- Once the House of Representatives passes the same resolution and it is signed into law by President Biden, EPA will be able to quickly commence regulation of methane emissions for this sector as well as volatile organic compounds ("VOC") and methane emissions for transmission and storage operations.
- Impacted sources in the sector should begin evaluating compliance with the 2016 Obama Administration rules governing methane from production and processing operations as well as transmission and storage operations.
- For production and processing operations, compliance with methane requirements should complement existing VOC compliance programs under NSPS Subpart OOOOa, although additional requirements could attach for operations in areas of ozone nonattainment.
- The 2020 technical amendments to the NSPS Subpart OOOOa program governing production and processing operations remain unaffected.

Detailed Analysis: Beginning in 2012 and again in 2016, the Obama administration promulgated new regulations of the oil and gas industry under the CAA's NSPS ("2016 NSPS"). Pursuant to the 2016 NSPS, the transmission and storage segment of the oil and gas industry was included in the NSPS regulated source category.^[1] This applied the NSPS standards to storage tanks, compressors, equipment

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leaks, and pneumatic controllers, among other sources in the transmission and storage segment.[2] The 2016 NSPS also added methane emission limits for the same segment.[3]

In 2020, EPA repealed these changes, issuing final policy amendments that removed the transmission and storage segment sources from the NSPS source category.[4] Further, EPA rescinded the separate methane emission limits for the production and processing segments of the source category while retaining limits for VOCs, and EPA also interpreted the CAA to require a “significant contribution finding” for any particular air pollutant before setting performance standards for that pollutant unless EPA addressed the pollutant when first listing or regulating the source category.[5] This latter requirement was significant, among other reasons, because the EPA did not consider methane emissions at the time it initially listed the oil and gas source category in 1979, and would thus require “significant contribution finding” for methane.[6]

In a separate rulemaking also finalized in 2020, EPA made a number of separate technical amendments to the 2016 NSPS.[7] This final rule was not cited in the resolution that passed the Senate.

This week, Congress began the process of reversing course. The Senate passed a resolution, S.J. RES. 14,[8] which disapproved of the EPA’s 2020 policy amendments. The Senate voted by a 52-42 margin, with three Republicans voting in the majority, to repeal the 2020 policy amendments pursuant to its authority under the Congressional Review Act (“CRA”). Pursuant to the CRA, certain agency rules must be reported to Congress and the Government Accountability Office.[9] After receiving the report, Congress is authorized to disapprove of the promulgated rule within 60 session days.[10] Significantly, when certain criteria are met, a joint resolution of disapproval cannot be filibustered in the Senate.[11] Moreover, disapproval carries with it longer term effects: the CRA prohibits a rule in “substantially the same form” as the disapproved rule from being subsequently promulgated (unless so authorized by a subsequent law).

Although the Senate resolution is a significant step towards repeal of the 2020 policy amendments, the 2016 NSPS are not yet back in effect. In order to repeal the 2020 rule and reinstate the 2016 NSPS (subject to the technical changes finalized in 2020 that are unaffected by the CRA resolution), the House of Representatives will also need to pass the same resolution, which it is expected to vote on in the coming weeks.[12] Disapproval renders the 2020 rule “as though such rule had never taken effect.”[13] Questions remain as to whether this repeal will reignite past litigation challenging the 2012 and 2016 NSPS rulemakings.

Affected facilities in the transmission and storage segments of the source category that will soon be subject to the NSPS should prepare for compliance. Furthermore, all facilities in the source category subject to NSPS, including in the production and processing segments, should ensure that they have adequate controls to meet the 2016 NSPS requirements for methane emissions. The practical impact of this reversion is uncertain, particularly given EPA’s findings in 2020 that separate methane limitations for these segments of the industry are redundant because controls used to reduce VOC emissions also reduce methane. Moreover, given the uncertainty created by the CRA’s language that a disapproved rule is rendered not only ineffective moving forward but also “as though such rule had never taken effect,” EPA likely will need to issue guidance to regulated entities in order to explain its expectations

for compliance and the timing thereof. EPA likely also will need to promulgate a ministerial rule restoring the applicable regulatory text from the 2016 NSPS in the Code of Federal Regulations.

Litigation over the 2012 and 2016 rulemakings, currently held in abeyance, likely will resume in the wake of this resolution. In addition, EPA will once again be responsible for issuing an existing source rule for this source category. Because EPA rescinded methane limits for the source category, EPA was no longer required to issue emission guidelines to address existing sources. This will change after the CRA resolution is approved.

[1] EPA Issues Final Policy Amendments to the 2012 and 2016 New Source Performance Standards for the Oil and Natural Gas Industry: Fact Sheet, [epa.gov](https://www.epa.gov/sites/production/files/2020-08/documents/og_policy_amendments.fact_sheet._final_8.13.2020_.pdf) (Aug. 13, 2020), https://www.epa.gov/sites/production/files/2020-08/documents/og_policy_amendments.fact_sheet._final_8.13.2020_.pdf.

[2] EPA’s Policy Amendments to the New Source Performance Standards for the Oil and Gas Industry, [epa.gov](https://www.epa.gov/epaospp/2020-08-13-epa-issues-final-policy-amendments-to-the-2012-and-2016-new-source-performance-standards-for-the-oil-and-natural-gas-industry) (Aug. 2020), [here](https://www.epa.gov/epaospp/2020-08-13-epa-issues-final-policy-amendments-to-the-2012-and-2016-new-source-performance-standards-for-the-oil-and-natural-gas-industry).

[3] *Supra* note 1. For additional analysis of the previous standard, *see* S. Fletcher and D. Schnitzer, “Inside EPA’s Plan for Reducing Methane Emissions,” *Law360* (Aug. 20, 2015), *available at* <https://www.gibsondunn.com/wp-content/uploads/documents/publications/Fletcher-Schnitzer-Inside-EPAs-Plan-For-Reducing-Methane-Emissions-Law360-08-20-2015.pdf>; “Client Alert: EPA Announces Program Addressing Methane Emissions from Oil and Gas Production,” (Jan. 15, 2015), *available at* <https://www.gibsondunn.com/epa-announces-program-addressing-methane-emissions-from-oil-and-gas-production/>

[4] *Supra* note 1.

[5] *Id.*

[6] *See id.*

[7] *Id.*

[8] A joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Environmental Protection Agency relating to “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review”, S.J.Res.14, 117th Cong. (2021).

[9] 5 U.S.C. §801(a)(1)(A).

[10] *See* 5 U.S.C. §802.

[11] *See* 5 U.S.C. §802(d).

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[12] Jeff Brady, *Senate Votes To Restore Regulations On Climate-Warming Methane Emissions*, NPR (Apr. 28, 2021), <https://www.npr.org/2021/04/28/991635101/senate-votes-to-restore-regulations-on-climate-warming-methane-emissions>.

[13] 5 U.S.C. §801(f).



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