

Congress Begins Congressional Review Act Rollbacks of Energy & Environmental Regulations This Week

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The House Rules Committee began meeting this week to discuss resolutions for overturning regulations passed under the Obama Administration. Within the GOP's crosshairs are key energy and environmental regulations, including the Bureau of Land Management's new methane restrictions related to the oil and gas industry, the Security and Exchange Commission's requirement for reporting payments to foreign governments, the Department of Interior's Stream Protection Rule requiring coal companies to restore mining lands back to their original state, and the Department of Energy's efficiency requirements, among others. In total, including environmental regulations, there are hundreds of agency rules recently promulgated under the Obama Administration which Congress may seek to overturn. These roll-back efforts are being given a high priority.

To overturn these regulations, Congress will use its authority under the 1996 Congressional Review Act (CRA). The CRA establishes a "fast-track" procedure to overturn rules issued by federal agencies within the last 60 days of a legislative session.¹ Public statements indicate that Republicans intend to roll back several regulations under the CRA, if not more. Further, judicial review of any "determination, finding, action, or omission" under the CRA is expressly barred.² It is therefore essential that affected industries

¹ The Congressional Research Service has calculated that the eligible date to place a rule within the CRA's jurisdiction is June 13th, 2016. See Christopher M. Davis and Richard S. Beth, Congressional Research Services, *Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress* (Dec. 15, 2016), <https://fas.org/sgp/crs/misc/IN10437.pdf>.

² 5 U.S.C. § 805 (2016). Two federal appeals courts and several federal district courts have examined this section and determined that it unambiguously prohibits judicial review of any question arising under the CRA. *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009); *Via Christi Reg'l Med. Ctr. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007). See, e.g., *United States v. Carlson*, 2013 U.S. Dist. LEXIS 130893 (D. Minn. 2013); *United States v. Ameren Mo.*,

follow any actions taken under the CRA closely and consider further actions to promote their interests before Congress, whether those interests lie in retaining specific existing rules or overturning them.

Since enacted, the CRA has been successful only once, overturning a single ergonomics regulation in 2001. The reasons for not applying it are, in part, the practical need for one party to control both houses of Congress and the White House. Additionally two other factors of the Act should be considered:

1. In its current form, the CRA requires a separate joint resolution of disapproval for each regulation; and
2. More importantly, CRA also contains a provision assuring each party in the Senate at least 5 hours (10 hours total) to debate each resolution.³ This provision could be crippling for the GOP to finalize its agenda, particularly since much of the time the Senate has scheduled to be in session for the first few months of the year will be dedicated to Trump Administration appointments. To this point, Senate Minority Leader Chuck Schumer has indicated that Democrats intend to use the full power of procedural delays for appointments during that time.

In order to limit the amount of time for Senate debate, the House has already passed an amendment to the CRA—the Midnight Rules Relief Act—on January 4th by a vote of 238-184. The Midnight Rules Relief Act allows for agency regulations to be bundled under the CRA into one omnibus up or down vote by a simple majority. Its passage is a preliminary step to clear the deck for the broadest possible effort to invalidate recently promulgated regulations.⁴

A companion Midnight Rules Relief Act was introduced on January 5th in the Senate, where it will face tougher scrutiny from Democrats and a potential filibuster. Whether Senate Republicans will aggressively pursue the bill is unclear, as no actions have been taken since it was introduced. Much depends upon whether the Senate legislation is successful. If it is, major portions of the Obama regulatory agenda could be rolled back—potentially within the next few weeks. If not, in all likelihood only a few existing regulations will be affected due to the Senate debate time requirements of each rule under the CRA.

It is critical to monitor any regulations eligible to be overturned by a CRA, particularly because the Act provides that a rule may not be issued in “substantially the same form” as a disapproved rule unless it is specifically authorized by subsequent law. This language effectively bars an agency from ever reenacting similar regulations without specific authorization from Congress.

While the meaning of these express restrictions may potentially be litigated and debated for years, if interpreted broadly, they will serve to severely restrict the ability of regulatory agencies to take further action on the affected regulations in at least the next two to four years.



2012 U.S. Dist. LEXIS 95065 (E.D. Mo. 2012); *Forsyth Mem'l Hosp. v. Sebelius*, 667 F. Supp. 2d 143, 150 (D.D.C. 2009); *Provena Hosps. v. Sebelius*, 662 F. Supp. 2d 140, 154–55 (D.D.C. 2009).

One federal district court has reached a contrary conclusion, ruling that it could review a claim based on noncompliance with the CRA. *United States v. S. Ind. Gas & Elec. Comp.*, 2002 U.S. Dist. LEXIS 20936 (S.D. Ind. 2002).

³ The resolutions may not be filibustered. The Congress can make a non-debatable motion to limit the debate, however. 5 U.S.C. § 802 (d)(2).

⁴ Additionally, the House passed the Regulations from the Executive in Need of Scrutiny (REINS) Act on January 5th by a vote of 237-187. This bill requires Agency rules with more than \$100 million in economic impact to be approved by both the House and the Senate before taking effect.

Eligible Agency Rules

The CRA can be used to overturn both major and non-major rules. The CRA defines a major rule as “any rule that the Administrator of the office of Information and Regulatory Affairs of the office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.”⁵

When a rule is designated as major under the CRA, there are two additional requirements. The first is that the Comptroller General is required to submit a report within 15 calendar days of its submission or publication date to the committee of jurisdiction. Second, the effective date of the rule may be delayed up to 60 days after the rule is published in the *Federal Register* or received by Congress, whichever is later.⁶

Below is a list and summary of all major Obama Administration energy and environmental rules eligible to be overturned under the CRA in reverse chronological order (which also sheds light on the rules the Obama Administration has rushed to get through). A list of non-major environmental rules is included in the [Appendix](#), organized by the issuing agency.

MAJOR ENERGY & ENVIRONMENTAL RULES

Title of the Rule	Regulation Identifier Number	Agency	Date Rule was Published in the Federal Register and Citation	Summary
Energy Conservation Standards for Residential and Commercial Air Conditioners and Heat Pumps	1904-AD37	Department of Energy	Jan. 6, 2017 82 FR 1786	Prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including residential central air conditioners and heat pumps.
Stream Protection Rule	1029-AC63	Department of the Interior; office of Surface Mining Reclamation and Enforcement	Dec. 20, 2016 81 FR 93066	Requires coal companies to restore land to the same condition that existed before digging began.

⁵ 5 U.S.C. § 804(2).

⁶ If the stated effective date of the rule is later than the 60 day requirement, the rule will continue to be effective on that date.
⁵ U.S.C. § 801(a)(3).

Title of the Rule	Regulation Identifier Number	Agency	Date Rule was Published in the Federal Register and Citation	Summary
Methane and Waste Prevention Rule	1004-AE14	Department of the Interior; Bureau of Land Management	Nov. 18, 2016 81 FR 83008	Requires oil and gas producers to use currently available technologies and processes to cut flaring in half at oil wells on public and tribal lands.
Energy Conservation Standards for Miscellaneous Refrigeration Products	1904-AC51	Department of Energy; Energy Conservation Program	Oct. 28, 2016 81 FR 75194	Adopts new energy conservation standards for miscellaneous refrigeration products.
Cross-State Air Pollution Rule Update For The 2008 Ozone NAAQS	2060-AS05	Environmental Protection Agency	Oct. 26, 2016 81 FR 74504	Will reduce ozone season emissions of oxides of nitrogen (NOX) in 22 eastern states that can be transported downwind as NOX or, after transformation in the atmosphere, as ozone, and can negatively affect air quality and public health in downwind areas.
Greenhouse Gas Emissions And Fuel Efficiency Standards For Medium- And Heavy-Duty Engines And Vehicles— Phase 2	2060-AS16 2127-AL52	Department of Transportation; National Highway Traffic Safety Administration	Oct. 25, 2016 81 FR 73478	Establishes a comprehensive Phase 2 Heavy-Duty (HD) National Program to reduce greenhouse gas (GHG) emissions and fuel consumption from new on-road medium- and heavy-duty vehicles and engines.
Migratory Bird Hunting Regulations On Certain Federal Indian Reservations And Ceded Lands For The 2016-17 Season	1018-BA70	Department of The Interior, Fish And Wildlife Service	Sept. 9, 2016 81 FR 62404	Prescribes special migratory bird hunting regulations for certain tribes on federal Indian reservations, off-reservation trust lands, and ceded lands. This rule responds to tribal requests for FWS recognition of tribal authority to regulate hunting under established guidelines. This rule allows the establishment of season bag limits and, thus, harvest, at levels compatible with populations and habitat conditions.

Title of the Rule	Regulation Identifier Number	Agency	Date Rule was Published in the Federal Register and Citation	Summary
Standards of Performance For Municipal Solid Waste Landfills	2060-AM08	Environmental Protection Agency	Aug. 29, 2016 81 FR 59332	Reduces emissions of landfill gas and its components, including methane, by lowering the emissions threshold at which a landfill must install controls. This action also incorporates new data and information received in response to the proposed rule-making and addresses other regulatory issues including surface emissions monitoring, wellhead monitoring, and the definition of landfill gas treatment system.
Emission Guidelines And Compliance Times For Municipal Solid Waste Landfills	2060-AS23	Environmental Protection Agency	Aug. 29, 2016 81 FR 59276	Reduces emissions of municipal landfill gas and its components, including methane, by lowering the emissions threshold at which a landfill must install controls. This action also incorporates new data and information received in response to the proposed rule-making and addresses other regulatory issues including surface emissions monitoring, wellhead monitoring, and the definition of landfill gas treatment system.
Revised Critical Infrastructure Protection Reliability Standards	No RIN provided	Department of Energy, Federal Energy Regulatory Commission	July 29, 2016 81 FR49878	Establishes a new or modified Reliability Standard that addresses supply chain risk management for industrial control system hardware, software, and computing and networking services associated with bulk electric system operations. The new or modified Reliability Standard is intended to mitigate the risk of a cybersecurity incident affecting the reliable operation of the Bulk-Power System.
Disclosure Of Payments By Resource Extraction Issuers	3235-AL53	Securities And Exchange Commission	July 27, 2016 81 FR 49360	Requires oil and gas companies traded on U.S. exchanges to disclose payments to foreign governments.

Title of the Rule	Regulation Identifier Number	Agency	Date Rule was Published in the Federal Register and Citation	Summary
Migratory Bird Hunting; Seasons And Bag And Possession Limits For Certain Migratory Game Birds	1018-BA70	Department of The Interior, Fish And Wildlife Service	July 25, 2016 81 FR48648	The final rule prescribes the hunting seasons, hours, areas, and daily bag and possession limits for migratory game birds. Taking of migratory birds is prohibited unless specifically provided for by annual regulations. This rule permits the taking of designated species during the 2016-17 season.
Oil And Gas And Sulfur Operations On The Outer Continental Shelf--Requirements For Exploratory Drilling On The Arctic Outer Continental Shelf	1082-AAOO	Department of The Interior, Bureau of Safety And Environmental Enforcement, Bureau of Ocean Energy Management	July 15, 2016 81 FR 46478	New and revised Arctic-specific regulatory measures for exploratory drilling conducted by floating drilling vessels and “jack-up rigs” (collectively known as mobile offshore drilling units or (MODU)) in the Beaufort Sea and Chukchi Sea Planning Areas.
Revision of Fee Schedules; Fee Recovery For Fiscal Year 2016	3150-AJ66	Nuclear Regulatory Commission	June 24, 2016 81 FR41171	Amends the licensing, inspection, special project, and annual fees charged to its applicants and licensees and, for the first time, NRC is recovering its costs when it responds to third-party demands for information in litigation where the United States is not a party (Touhy requests).
Energy Conservation Program: Energy Conservation Standards For Battery Chargers	1904-ABS7	Department of Energy	June 13,2016 81 FR 38266	Prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including battery chargers.
Energy Conservation Program: Energy Conservation Standards For Dehumidifiers	1904-AC81	Department of Energy	June 13,2016 81 FR 38338	Prescribes energy conservation standards for dehumidifiers.

Uncertainties about How Far Congress Will Go

In addition to the list above, there is also a risk that Congress may try to broaden its authority to encompass other targeted environmental regulations under the CRA through the following actions.

a) Debate About the Exact Cut-Off Date for Rules Eligible to be Overturned by the CRA

The Congressional Research Service (CRS) has indicated that any rule made final on or after June 13, 2016 is eligible to be overturned by the 115th Congress.⁷ Earlier estimates from the CRS indicated a date of May 30, 2016 for eligibility. However, the House's decision to hold periodic *pro forma* sessions until January 3rd has resulted in the new June 13 date. This is critical because the EPA's New Source Performance Standards for the oil and gas sector—including the controversial new methane emissions rule—was finalized on June 3, just after the previous May cutoff date.

The CRS has reported that a *pro forma* meeting qualifies as a day of session.⁸ It is important to note, however, that CRS estimates are unofficial and nonbinding. The House and Senate Parliamentarians are the sole definitive arbiters of the CRA parliamentary mechanism, including day count calculations.

Thus, if the House and Senate Parliamentarians decide that *pro forma* days do not count as legislative or session days under the CRA, the EPA's rule could be subject to a simple majority up or down vote under the act. Additionally, the EPA would be prohibited from passing any "substantially similar" rules in the future, absent specific, authorizing Congressional legislation.

Title of the Rule	Regulation Identifier Number	Agency	Date Rule was Published in the Federal Register and Citation	Summary
Oil And Natural Gas Sector: New Source Performance Standards	2060-AS30	Environmental Protection Agency	June 3, 2016 81 FR 35824	Curbs emissions of methane, smog-forming volatile organic compounds (VOCs), and toxic air pollutants such as benzene from new, reconstructed and modified oil and gas sources.

b) Other Agency Actions

Congress may also attempt to broaden the authority of the CRA to include other agency actions beyond final rules. Two instances where this might arise are:

1. The August 5th, 2016 Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews issued by the Council on Environmental Quality. This guidance was issued to federal agencies to encourage them to analyze the full climate

⁷ See Christopher M. Davis and Richard S. Beth, Congressional Research Services, *Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress* (Dec. 15, 2016), <https://fas.org/sgp/crs/misc/IN10437.pdf>.

⁸ Maeve P. Carey, Christopher M. Davis, and Casey Burgat, Congressional Research Services, "Major" Obama Administration Rules Potentially Eligible to be Overturned under the Congressional Review Act in the 115th Congress 2 n.4 (Jan. 3, 2017).

impacts of their proposed actions subject to NEPA analysis, and has gone through a full notice and comment proceeding. If not eligible to be disapproved under a CRA, it is likely that the GOP will take other actions to overturn the guidance.

2. The November 10th, 2016 Final Information Collection Request by the EPA, a precursor to a final rule on methane emissions for existing sources.

The ability to judicially challenge Congress's determination of what is a final "rule" under the CRA is unclear.⁹

Actions This Week

The House Rules Committee held meetings on the Stream Protection Rule and the Securities and Exchange Commission's payment disclosure rule on Monday, and met regarding the Bureau of Land Management's methane rule Tuesday. All three resolutions for disapproval were voted on by the Rules Committee to be sent for consideration in the House.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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⁹ See *supra* note 2 and accompanying text.